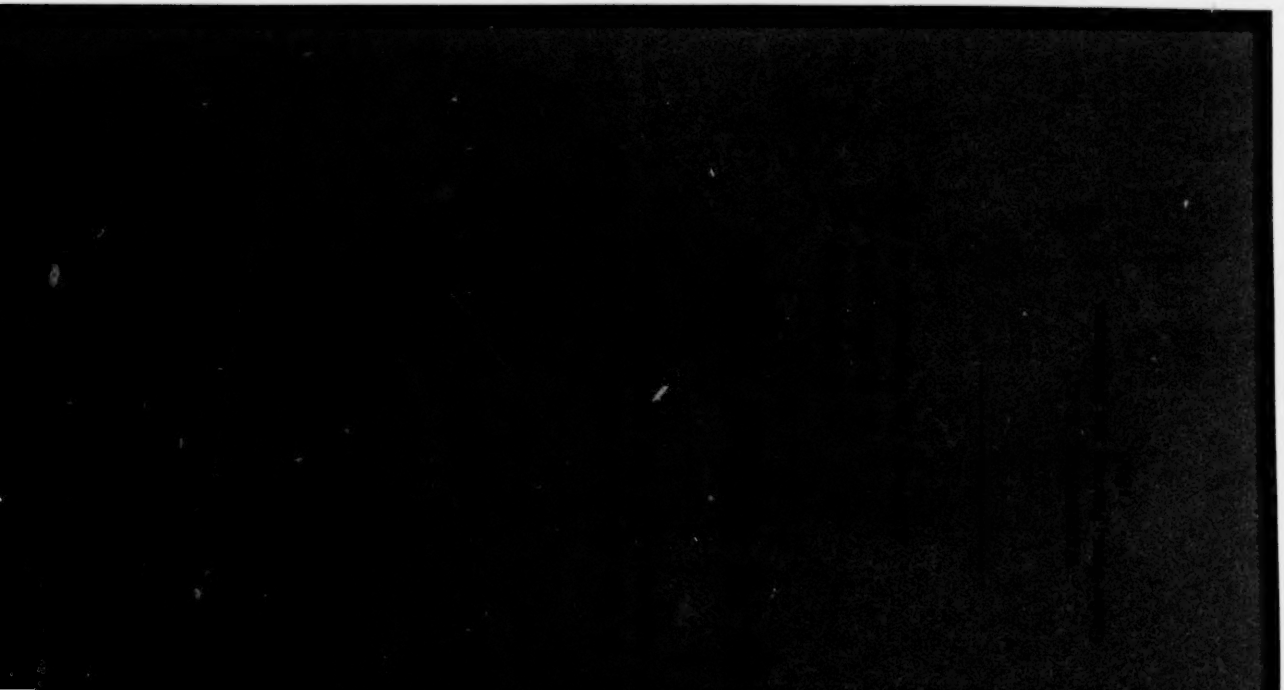

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JULIUS A. BELEY, F. DARLING, AND CHARLES BREGARD,
PLAINTIFFS IN ERROR,
v.
JOSEPH NAPHTALY.

No. 180.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This was an action at law brought in the Circuit Court of the United States in and for the Ninth Circuit and Northern District of California, by Joseph Naphtaly against Beley *et als.*, to recover the possession of certain lands in Contra Costa County, California, and also damages for the withholding thereof. The complainant alleges that Naphtaly was the owner in fee and entitled to

the possession of the controverted premises by virtue of a patent from the United States, issued to him pursuant to an approved application by him to purchase the lands under and by virtue of the seventh section of the Act of Congress of July 26, 1866 (14 Stats. 218), and that being so rightfully in possession, he was thereafter wrongfully ousted and the possession thereof wrongfully withheld by the defendants to his damage in the sum of one thousand dollars. (Rec. 1–3.)

Bregard failed to appear, and his default was entered for failure to plead.

Beley and Darling filed separate answers, denying that Naphtaly was the owner in fee of the demanded premises, or that title had vested in him by virtue of patent duly or regularly issued to him by the United States, or that they had unlawfully detained the premises from him, or to his damage. They admitted that the value of the described land and of the matter in dispute exceeded the sum of $2,000, exclusive of interest and costs. (Rec. 4–5, 6–8.)

To maintain the issues on his part, Naphtaly put in evidence two patents of the United States to him, which admittedly embraced the land in controversy, and he proved the rental value of the land, and that whilst he was in the peaceable and quiet possession thereof he was ousted therefrom by the defendants, and that they had ever since withheld possession from him. (Rec. 11–13.)

It was thus admitted by the defendants (Rec., p. 13) "*that at the time of the issuance of the patents hereinbefore* "*described the lands therein and in the complaint described* "*were public lands of the United States, subject to sale* "*under the laws of the United States;*" and "that de- "fendants did not propose to connect themselves in any "manner or form with the title of the United States to

" the premises described in the complaint herein, or any " part thereof, either by certificate of purchase, patent, or " anything of the kind."

Thereupon the defendants offered in evidence the record of proceedings in the General Land Office at Washington, upon which Naphtaly obtained his patents (Rec. 13–21), to the introduction whereof plaintiff objected because immaterial, incompetent, and irrelevant for the purpose of affecting the validity of the patents. The Court sustained the objection, to which ruling defendants excepted and thereupon rested. Jury having been waived, the Court ordered judgment, and same was duly entered in favor of Naphtaly and against the defendants, in accordance with the prayer of the complaint. (Rec. 8.)

Motion for new trial having been denied, the case was taken by writ of error to the Circuit Court of Appeals, where the judgment of the Circuit Court was affirmed with costs. Thence the case comes by writ of error to this Honorable Court.

ARGUMENT.

The ten assignments of error raise only two general questions:

1. CAN THE DEFENDANTS BELOW, UPON THEIR ADMISSIONS OF RECORD, AND IN AN ACTION AT LAW, COLLATERALLY ATTACK THE NAPHTALY PATENTS?

2. IF SO, WAS THEIR EVIDENCE OFFERED SUFFICIENT TO INVALIDATE SAID PATENTS?

I.

Collateral Attacks upon Patents in a Law Action.

The record presents the case of a naked trespasser, who has wrongfully dispossessed a patentee of the United

States, and then seeks in an action of ejectment to defend his trespass by collaterally attacking the validity of the patent. It is precisely the case ruled upon by this Court in *Ehrhardt* v. *Hogaboom*, 115 U. S. 68, where it was said:

"He was, as to the twenty acres, a simple intruder, "without claim or color of title. He was, therefore, in "no position to call in question the validity of the patent "of the United States for those acres, and require the "plaintiff to vindicate the action of the officers of the "Land Department in issuing it." * * *

The general doctrine as to the conclusiveness of a patent of the United States in an action at law has been repeatedly announced by this Court. All presumptions support the regularity of the proceedings upon which such patent issued; and if the land embraced therein was public land subject to sale, and not previously sold or reserved, the patent is not open to collateral attack in an action of ejectment. The Land Department having jurisdiction under the law to convey the land, resort must be had to a court of equity for relief, and then only when a complainant connects himself with the original source of title, and upon a showing that, by reason of superior equities, his rights have been injured by the issuance of the patent. Otherwise, a patent can only be assailed in a direct proceeding on the part of the United States.

Such a trespasser cannot be heard against the patent, either at law or in equity. For in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647, in holding the patent protected from collateral attack at law, this Court further declared:

"He must resort to a court of equity for relief, and "even there his complaint cannot be heard unless he con-"nect himself with the original source of title, so as to

" be able to aver that his rights are injuriously affected
" by the existence of the patent; and he must possess
" such equities as will control the legal title in the
" patentee's hands. Boggs *v.* Mining Co., 14 Cal. 279,
" 363. It does not lie in the mouth of a stranger to the
" title to complain of the act of the Government with re-
" spect to it. If the Government is dissatisfied, it can, on
" its own account, authorize proceedings to vacate the
" patent or limit its operation."

In *Hartman* v. *Warren*, 76 Fed. Rep. 157, the Circuit Court of Appeals, in full discussion of the authorities on this question, holds:

"In every case cited by counsel for appellant in which
" the equitable right to the land prevailed over the legal
" title, the former had either been recognized by the
" United States by a grant or an entry of the land, or by
" the acceptance of payment for it, so that the equitable
" owner was in privity with the Government, or the
" equitable right had been *initiated* before the claim
" which went to patent by a settlement or an improve-
" ment of the land under a law which gave to the
" settler or improver a right to be preferred in its acqui-
" sition."

Smelting Company v. *Kemp*, *supra*, was a case wherein the defendant offered in evidence the record of the proceedings upon which the patent was based, in order to impeach its validity (precisely as in the case at bar), and the admission of this evidence by the Court below was held by this Court to have been error. It was therein emphatically said:

"A patent in a court of law is conclusive as to all
" matters properly determinable by the Land Department,
" when its action is within the scope of its authority, that
" is, when it has jurisdiction under the law to convey the
" land. In that case the patent is unassailable for mere

" errors of judgment * * * On the other hand, a " patent may be collaterally impeached in any action, and " its operation as a conveyance defeated, by showing that " the Department had no jurisdiction to dispose of the " lands;—that is, that the law did not provide for selling " them, or that they had been reserved from sale, or dedi- " cated to special purposes, or had been previously trans- " ferred to others. In establishing any of these particu- " lars, the judgment of the Department upon matters " properly before it is not assailed, nor is the regularity " of its proceeding called into question; but its authority " to act at all is denied and shown never to have existed.

" According to the doctrine thus expressed and the " cases cited in its support,—*and there are none in conflict* " *with it*—there can be no doubt that the Court below " erred in admitting the record of the proceedings upon " which the patent was issued, in order to impeach its " validity. The judgment of the Department upon their " sufficiency was not, as already stated, open to contes- " tation. If in issuing a patent its officers took mistaken " views of the law, or drew erroneous conclusions from " the evidence, or acted from imperfect views of their duty, " or even from corrupt motives, a court of law can afford " no remedy to a party alleging that he is thereby " aggrieved. He must resort to a court of equity for re- " lief, and even there his complaint cannot be heard un- " less he connect himself with the original source of title, " so as to be able to aver that his rights are injuriously " affected by the existence of the patent; and he must " possess such equities as will control the legal title in " the patentee's hands. * * * It does not lie in the " mouth of a stranger to the title to complain of the acts " of the Government with respect to it. If the Govern- " ment is dissatisfied, it can, on its own account, author- " ize proceedings to vacate the patent or limit its opera- " tion."

See *Johnson* v. *Towsley*, 13 Wall. 72.
Vance v. *Burbank*, 101 U. S. 519.
Steel v. *Smelting Co.*, 106 U. S. 454.

Under these established principles, the Court below did not err in excluding the evidence offered to attack the validity of the Naphtaly patents, unless that evidence was directed to a want of authority in the Land Department to issue the patents. But obviously the admission that the lands were public lands, subject to sale under the laws of the United States, put at rest all questions of jurisdiction; and no fraud or imposition being alleged, the offer of proof simply challenged the correctness of the judgment of the Secretary of the Interior upon matters of fact within his jurisdiction. Under the 7th section, Act July 23, 1866, the Land Department was authorized to recognize a preference right of purchase by parties who established to its satisfaction the following facts:

1st. That the applicant purchased the lands from a Mexican grantee, or his assigns.

2d. That he purchased the lands in good faith and for a valuable consideration.

3rd. That the grant had "subsequently been rejected," or the lands purchased had been "excluded from the "final survey."

4th. That the purchasers had "used, improved and "continued in the actual possession of the same accord-"ing to the lines of their original purchase."

5th. That no valid adverse right or title (except of the United States) existed thereto.

6th. That the lands did not contain mines of gold, silver, cinnabar, or copper.

These are matters of fact of which the statute requires proof to the satisfaction of the Land Department. The issuance of the patents to Naphtaly raised the presumption that all of these facts were proven in his favor. That presumption is conclusive in an action at law, where the lands were admittedly public lands subject to sale, and

not previously sold nor reserved. Especially so as against a naked trespasser. As was said by this Court in *Ehrhardt* v. *Hogaboom*, 115 U. S. 69,—

" It is the duty of the Land Department, of which the " Secretary is the head, to determine whether land patented " to a settler is of the class subject to settlement under " the pre-emption laws, and his judgment as to this fact is " not open to contestation in an action at law by a mere " intruder without title."

The offer of proof was obviously an effort to show that the Secretary of the Interior took a mistaken view of the law or drew erroneous conclusions from the evidence ; and it was properly excluded by the Court below. As was said in *Quinby* v. *Conlan*, 104 U. S. 425,—

" The proofs offered in compliance with the law are to " be presented, in the first instance, to the officers of the " district where the land is situated, and from their decis- " ion an appeal lies to the Commissioner of the General " Land Office, and from him to the Secretary of the In- " terior. For mere errors of judgment as to the weight " of evidence on these subjects by any of the surbordi- " nate officers, the only remedy is by an appeal to his " superior of the Department. The courts cannot exercise " any direct appellate jurisdiction over the rulings of those " officers, or of their superior in the Department in such " matters, nor can they reverse or correct them in a col- " lateral proceeding between private parties."

In concluding our discussion of this point, we further suggest that this action could stand upon the admitted prior possession of Naphtaly. He and his grantors had used and possessed this land for half a century under claim of title before he was forcibly dispossessed by plaintiffs in error here (defendants below). Such prior

possession under claim of title is sufficient to sustain this action as against mere intruders.

II.

If, however, it was error to exclude the evidence offered, then was such evidence sufficient to invalidate the patents?

Three propositions are advanced by plaintaiffs in error to sustain this contention.

1st. That one Secretary of the Interior has no power to grant a rehearing of a case decided by his predecessor; and, thereupon, as the claim of Naphtaly was denied by Secretary Vilas, the subsequent reconsideration and allowance thereof by Secretary Noble was without authority of law, and void.

2d. That as the preference right to purchase provided for in Section 7, Act of July 23, 1866, was extended to purchasers, &c., from "Mexican *grantees* or assigns, "which *grants* have subsequently been rejected," and as the Romero claim was rejected because there was no *grant*, therefore the Land Department was without authority to permit a purchase of *that* land under the Act of 1866.

3d. That even if a right of purchase ever existed in any one, Naphtaly was not a purchaser in good faith, he having bought after final rejection of the Romero claim of title.

A.

Power of the Secretary to Reconsider.

The Secretary of the Interior is authorized to prescribe Rules of Practice for the conduct of business in the Land Department, and the legal effect of such regulations has

been uniformly recognized. The rule governing motions for review of decisions of the Secretary of the Interior, which was in force at date of the decision of Secretary Vilas of February 4, 1889, which was approved by Secretary Vilas under date of June 14, 1888, was as follows (see printed Rules of Practice, approved August 13, 1885):

"Rule 114. Motions for review before the Secretary of "the Interior, and applications under Rules 83 and 84, "shall be filed with the Commissioner of the Land Office, "who will thereupon suspend action under the decision "sought to be reviewed, and forward to the Secretary said "motion or application."

The record does not challenge the regularity of the motion for review in pending case, and same may therefore be assumed. To show, however, the exact sequence of dates, we print for convenient reference, in appendix, copy of the motion for review, of the letter filing same, and of the proof of service. Mr. Vilas went out of office March 4, 1889. His decision in the Naphtaly case was dated February 4, 1889 (Rec., p. 10), and the motion for review was filed on March 1, 1889. The review was thus prayed for during the incumbency of the SAME Secretary who rendered the decision.

No question has been made as to the power of a Secretary to review his own decision. The contention of plaintiff in error has been that a succeeding Secretary could not review the decision of his predecessor. Inasmuch, then, as jurisdiction to review attached during the official term of Secretary Vilas, it must have continued after his retirement until decision of his successor, unless the jurisdiction to review was purely personal to the temporary incumbent of the office. We need scarcely answer that contention.

The rule is well established that where title has passed out of the United States, so that the jurisdiction of the Executive Department has ended, there is no authority to review. That is the doctrine of *Noble* v. *Logging Co.*, 147 U. S., and of *U. S.* v. *Stone*, 2 Wall. 537, relied upon by plaintiffs in error. In such cases no succeeding Secretary could lawfully review the executed decision of his predecessor. Neither could the same Secretary have done so under like conditions. But no such rule prevails where the matter is still within the jurisdiction of the Department. A decision being unexecuted, the matter is *in fieri*, and is subject to such further action as the officer who is called upon to act may determine to be proper and lawful. The power of review where the *rem* is still within the jurisdiction of the Secretary has been uniformly exercised in the Land Department, and the principle underlying such exercise of revisionary authority was clearly stated by this Court in *Williams* v. *U. S.*, 138 U. S. 524:

"It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute may sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervisory power which will enable him, in the face of these unexpected contingencies, to do justice."

So also in *Knight* v. *Land Association*, 142 U. S. 178:

"For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to to institute proceedings for its annulment, it would hardly

" be seriously contended the Secretary might not in-
" terfere and prevent the execution of the patent. He
" could not be obliged to sit quietly and allow a proceed-
" ing to be consummated which it would be immediately
" his duty to ask the Attorney-General to take measures
" to annul."

And the point raised by plaintiffs in error was distinctly ruled upon in *New Orleans* v. *Paine*, 147 U. S. 266, thus:

" Until the matter is closed by final action the proceed-
" ings of an officer of the Department are as much open to
" review or reversal by himself, *or his successor*, as are the
" interlocutory decrees of a Court open to review upon the
" final hearing."

And the Court at presest term—in *Michigan Land & Lumber Co.* v. *Rust*, *No.* 57—has settled the question beyond the need for further discussion by distinctly holding executive jurisdiction continuing until legal title has vested when the Courts thereafter take jurisdiction.

B.

Want of authority to sell lands to purchasers, &c., where grant was rejected upon the ground that no grant was ever issued by Mexico.

The contention of plaintiff in error is that the preference right of purchase extended by Section 7, Act of July 23, 1866, has no application where no grant had been made by Mexico. The argument in brief is that, there having been no grant, there could be no rejection of a grant, and hence there could be no Mexican grantee from whom to purchase.

This contention is narrow, technical, and unsound. It is a mere play upon words, which defeats the remedial

purpose of the statute. Congress had in 1851 provided for the adjudication of these grant claims, and pending their final settlement had reserved all lands within their claimed limits from the operation of the public land system. (See *Newhall* v. *Sanger*, 92 U. S. 761.) Many years were occupied in this inquiry, during which the extent, whether of title or location, to which these claims would be finally located was purely a matter of legal opinion. In the meantime California was being rapidly settled. The most valuable agricultural lands were naturally included within these Mexican grant claims, and were the object of most speedy sales and transfers. They could not be purchased under the public land laws, having been reserved therefrom until final judicial rejection, and the apparent ownership of the grant claimants to all lands within their claimed limits was fully recognized and protected by the courts, both State and Federal (*Van Reynegan* v. *Bolton*, 95 U. S. 33). These lands, so claimed, were legally sold, and the tracts so purchased were extensively improved and resold over and over again. After all this had occurred, during the lapse of many years, the examination under authority of Congress resulted in some cases in rejecting the entire claim, in other instances in confirming it in part, and in others in confirming it as an entirety. In the case of a wholly rejected grant, all these Mexican grant claimants and their assigns were left absolutely without title. In partially confirmed grants, the segregration, like a blanket, could only cover a given area, and when pulled over one set of derivative claimants it was necessarily pulled off another set. In confirmation as an entirety, it often happened that the survey did not locate the boundaries as they had been theretofore claimed, and thus excluded occupants under the grant claim of title. In one way and

another, many derivative claimants were thus left in actual possession, but without title. They had paid large sums for their lands, and had put upon them valuable improvements. They were, too, the only persons whose right of possession had been recognized and protected by the courts. The equities of these parties appealed strongly to Congress, and at first received recognition in a series of special acts, which finally led up to the general provisions of the seventh section of the Act July 23, 1866. No less than seven of such special laws were thus enacted prior to said general law (Soscol Ranche Act, March 3, 1863, Stat. 12, p. 808; Rancho Bolsa de Tomales, Stat. 13, p. 136; Rancho Laguna de los Santos Calle, Stat. 13, p. 372; Ex Mission San José, Stat. 13, p. 534; City and County of San Francisco, Stat. 14, p. 4; Rancho los Prietos y Najalayegua, Stat. 14, p. 589; Towns of Benina and Santa Cruz, Stat. 14, p. 209), until Congress finally covered the cases of all like purchasers or their assigns in similar possession under the general preference right of purchase enacted in Section 7, Act of July 23, 1866. Congress did not therein undertake to validate defunct titles. No donation was made. Congress simply determined by this legislation that a citizen who had in good faith bought from these Mexican claimants and occupied the lands purchased, and whose possession under color of title had been recognized and protected, but whose claim of title had failed, should have a right to purchase those lands in preference to a party who had no recognized right of possession, and who had neither purchase money nor improvement at stake. The principle of the statute was not the ownership of a legal title, but rather the protection of an equity; and the required qualifications were a purchase from one claiming to have been a Mexican grantee, and possession under such claim of title according to the

lines of purchase, but to which the claim of title had failed ,—failed for either of the only two possible reasons, viz., that the title had been *rejected*, or that the lands had been surveyed out. The inquiry under the obvious purpose of the law is, Did the claimant of the preference right of purchase from the United States buy these lands from a grantor whom they believed to have been a grantee of the Mexican Government; and, if so, has he improved and had possession of the lands so purchased? The principle was clearly stated by the Supreme Court of California in *Bascomb* v. *Davis*, 56 Cal. 152, wherein it was said:

"If we should hold that a 'Mexican grantee' means a "person to whom a grant has been made by the Mexican "Government, it is quite clear that Galindo would not be "within that description; but that construction of the Act "would render it superfluous, and Mexican grantees or "their assigns would not require any such aid. The Act, "therefore, must have been passed for the benefit of "others than those who had purchased lands of grantees of "the Mexican Government. We believe that it was passed "for the benefit of those who, in good faith and for a "valuable consideration, had purchased the lands which "were *supposed* to have been granted by the Mexican "Government, and who had used, improved, and con-"tinued in the actual possession thereof as provided in "the Act.

"It seems to us that the good faith of the purchaser, "his payment of a valuable consideration, and his occu-"pation and improvement of the land were the consid-"erations which moved Congress to pass this Act; and "if so, the case of this defendant is fairly within the "spirit of the law. In the absence of any valid or ad-"verse right or title, or *bona-fide* pre-emption claim, there "does not seem to be anything inequitable in the United "States preferring as a purchaser one who has once "paid for the land, under the honest but erroneous im-

" pression that he was acquiring a valid title, to the one " who had never purchased or occupied it. We are, " therefore, of the opinion that the defendant was a " purchaser within the meaning of the Act of Congress " above referred to."

The *principle* of construction for which we contend was squarely ruled upon by this Honorable Court in *Winona and St. Peter R.R. Co.* v. *Barney*, 113 U. S. 626. Congress had granted certain lands to the Territory of Minnesota for railroad purposes, and had further provided indemnity for specified losses in the lands " granted " as aforesaid." Under the same technical construction of the word "granted" that is asserted here by plaintiffs in error, it was contended that the Government did not own lands sold by it before date of the grant, and as it could not grant what it did not own, indemnity was not due under the words "granted as aforesaid." But this Court, in deciding that the indemnity covered losses both before and after date of the grant, disposed of the above contention by saying :

" It is of no purpose to say against this construction " that the Government could not grant what it did not " own, and, therefore, could not have intended that its " language should apply to lands which it had disposed " of. As already said, the whole Act must be read to " reach the intention of the law-maker. It uses, indeed, " words of grant which purport to convey what the " grantor owns, and, of course, cannot operate upon lands " with which the grantor had parted; and, *therefore*, " *when it afterwards provides for indemnity for lost por-* " *tions of the lands 'granted as aforesaid' it means of the* " *lands purporting to be covered by those terms.*"

By analogous reasoning Section 7, here in question, in saying " which grants have subsequently been rejected,

" or where the lands so purchased have been excluded " from the final survey of any Mexican grant " obviously is to be read as " which purported grants " or " which " claims of grants." This follows necessarily, because the evil intended to be remedied was a *bona-fide* purchase and continued possession culminating in a *total failure of title.*

C.

That Naphtaly was not a Purchaser in Good Faith, he having bought after Final Rejection of the Romero Title.

The Romeros, on January 18, 1844, solicited a grant from the Mexican Governor. Upon their petition was a marginal decree directing the Secretary to report upon the subject, " having first taken such steps as he may deem " necessary." There was also a certificate of the Secretary that the Governor directs the first Alcalde of San Jose to summon the colindantes and report upon their allegations ; a report of the Alcalde that the colindantes, having been duly summoned, made no objection to the grant, but that another party had claimed the same tract several years before ; a report from the Secretary that there was no obstacle to making the grant ; a decree directing measurement of the land by the proper judge, and that he " certify the result so that it may be granted to the " petitioners ;" a second petition of the Romeros stating failure of judge to make measurement and asking provisional grant ; report of Secretary that survey should first be effected, and decree of Governor, viz., " Let " everything be done agreeably to the foregoing report."

In *Romero* v. *United States*, 68 U. S. 740, the United States Supreme Court decided that these documents were

not sufficient evidence to establish a grant or concession from Mexico, and finally rejected the claim. This was in December, 1863. But in January, 1844, the Romeros went into possession of the lands then petitioned for, and in 1846 or 1847 the tract here in controversy was partitioned to Innocencio Romero. Said Innocencio in turn sold and conveyed for value, on December 26, 1853, to Domingo Pujol and Francisco Sanjurjo; and through subsequent mesne conveyances the same tract passed to S. P. Millett, August 5, 1859, who continued in the actual possession and cultivation thereof according to the lines of the original purchase to the time of the passage of the Act of July 23, 1866, and long subsequent thereto. Thereafter the title passed for value through various parties, and with continued use and possession, until it was finally vested in Naphtaly.

So that the title passed for value from the Romeros, the original Mexican claimants, ten years prior to final rejection of the title, and it similarly was vested in Millett four years prior to such rejection, and remained in him until long subsequent to the passage of the Act of July 23, 1866. The material fact, then, is that Millett purchased prior to the final rejection of the grant, and was at the date of the passage of the Act of July 23, 1866, a fully qualified beneficiary of the preference right of purchase under the seventh section thereof. The contention of plaintiff in error is therefore a mere denial of the assignability of that preferential right of purchase.

But the entire policy of the law in the matter is against restraints upon the alienation of interests in or titles to lands; and it has been uniformly held that every right, title, interest, or claim in lands is assignable or inheritable, unless such transfer or dissent is prohibited by statute. *Co. Litt.* 46b; *Washburn on Real Property*, Ch. 1, Sec.

20; *Thredgill* v. *Pintard*, 12 How. 24; *Myers* v. *Croft*, 13 Wall. 291; *Lamb* v. *Davenport*, 13 Wall. 418; *Hussey* v. *Smith*, 99 U. S. 22. The most recent reaffirmance of this general right to assign interests in lands will be found in *Webster* v. *Luther*, 163 U. S. 331, wherein this Court affirmed the right to transfer before entry a right of additional homestead.

The language of the 7th section, Act of July 23, 1866, clearly does not prohibit the alienation of the preference right therein provided for; and neither would the purpose of the law. On the contrary, the statute in terms conferred the preference right only upon assigns. Nor did the law impose, as a condition upon this right to purchase, some act to be performed by a particular beneficiary, of such character as to make the right a personal one. On the contrary, the condition of the law had already been performed, and the right to make entry had vested. It did not cease merely because, as in present case, the unsurveyed character of the land did not put it in condition for entry until the beneficiary had died or had alienated his interest. The continued possession and under purchase for value from the original Mexican grantee or his "assigns," were the equities to which the relief of the law was directed; and those equities, established and vested at date of the remedial Act, were quite as potent in the hands of one assign as in the ownership of another. The hardships of the case, which Congress had in view, were quite as great in either case; and whilst Naphtaly is chargeable at time of his purchase with notice of the prior rejection of the grant title, he is equally entitled to knowledge of the vesting of the perference purchase right and of its assignability. His right is clearly within the equity of the Act of Congress.

The rulings of the Land Department have been uni-

formly in support of the right of assignment. (*Wilson* v. *C. & O. R.R. Co.*, 1 Copp's Land Owner, 471; *Owen* v. *Stevens*, 3 Land Decisions, 401; *Welch* v. *Molino*, 7 *ib.* 210.) Such continuous executive construction for thirty years past, and the innumerable rights vested thereunder, should constitute a very persuasive, if not wholly conclusive, argument.

Since writing foregoing we are served with brief for plaintiffs in error. We need only add—

1. The Mexican grant claim was *sub judice* until final rejection thereof by this Court at December term, 1863. The preference right of purchase from the United States under Sec. 7 of the Act of 1866 has never been denied any claimant thereunder because he or his grantors purchased after adverse decision by the Board of Land Commissioners or the District Court. The final determination of title rested in *this* Court, and until such final rejection the right of transfer of the grant claim carried with its exercise the recognition of the preference right of purchase in such "assigns," under the plain provisions of Sec. 7. The claim here in question passed into the hands of third parties as early as 1853.

2. The several requirements imposed by the seventh section were matters of *fact*, determinable by the U. S. Land Department. In the absence of fraud or legal mistake, such findings are conclusive. This is settled law, clearly established by numerous decisions of this Court, some of which are cited *supra*. The doctrine is again clearly and forcibly stated in the analogous case of *Wormouth* v. *Gardner*, 112 Cal. 506, 512, thus:

"Whether Throckmorton did, in fact, purchase the "land for a valuable consideration, or whether after his "purchase he used and improved and continued in the "actual possession of the same according to the lines of

" his purchase, were questions of fact, to be determined " by the Secretary of the Interior. The good faith of " Throckmorton in making the purchase, as well as his " belief that the land he purchased was included within " the original limits of the Mexican grant, were also facts " to be determined by that officer from all the circum- " stances under which the purchase was made. Whether " that officer properly considered the weight to which the " evidence before him was entitled, or whether he drew " correct conclusions from that evidence, his determina- " tion with reference to these facts, whether correct or " erroneous, is conclusive upon the judicial tribunals. " These tribunals cannot exercise a revisory jurisdiction " over him in matters which are within the scope of the " authority conferred upon him, but if, upon the undis- " puted facts, he made an erroneous application of the " law pertinent to those facts, his action is open to re- " view."

Hence the assignments of error which assume that the Court below erroneously held Millett to be a purchaser in good faith are without force or relevancy here. The same answer equally applies to assignment of error VII, inasmuch as the finding of the Secretary clearly covered the *fact* and *extent* of the possession to which the right of purchase under the seventh section of the Act of 1866 was extended.

3. Equally erroneous is the assumption that claimants under Section 7 must cause a private survey of their lands to be made, and must purchase in accordance therewith. *Contra*, final rejection of the grant claim or exclusion of the land from a confirmed claim on final survey thereof left *such* land as *public* lands of the United States with preference right of purchase in the claimant. They were thereafter to be surveyed as public lands, and by the established system applicable thereto. Section 7 in terms requires their survey as such " under existing laws " *before*

the right of purchase can be exercised. Such has been the uniform and correct rule of administration by the United States Land Department. Until thus officially surveyed by the United States the opportunity to present claim and proof and make such purchase and entry manifestly could not be exercised by the claimant. The diagram in the record which accompanied Naphtaly's application to so purchase defines in red dotted lines the boundaries of such proven possession with relation to the surveyed sections and parts of sections covered by his purchase and patents from the United States.

4. The fact appears that the Romeros *partitioned* their claim in 1846 or 1847 (Rec. 13), and thereunder Innocencio Romero took exclusive possession of the tract, which he subsequently used and cultivated, and thereafter sold, in 1853, and which passed from purchaser to purchaser until Naphtaly's purchase and possession. This *fact* answers all of the argument that no right of purchase was conferred by the seventh section of the Act of 1866 upon a claim for an undivided interest. Whilst the argument is unsound, it has no relevancy here, for parol partition with severance of possession is as complete and binding as by formal conveyance. This matter was fully heard and determined by the Secretary in this case, and his finding is neither erroneous nor subject to review.

5. The admission of defendants (Rec. 13) demonstrates that they assert *here* no claim under any law of the United States. The assumption of opposing brief that, notwithstanding this, they may assert our patents to be void is without force. They concede that the lands were public; were within the jurisdiction of the Land Department, and manifestly that jurisdiction was exercised. The authorities cited on opposing brief on this head deal only with cases where the jurisdiction of the Department was wholly lacking, and hence attempt to deal with the *subject-*

matter—i. e., the lands—renders the patent void. The distinction is controlling and too obvious to require discussion.

Jones v. *Wilkinson*, 44 Pac. Rep. 735, 737.

Conclusion.

Upon the one hand appears continuous use and possession by the original claimants since 1844, and their successive grantees in interest for a period of over fifty years. The protection of the equity of *that* possession was the clear design of the Act of 1866, which, as its title imports, was an Act "To quiet land titles in California." The Act has been so administered in numerous cases, and repeated judicial rulings have upheld such design and administration. Intruding upon that possession of many years come the defendants—admitted trespassers, intruding with full knowledge of the existence and extent of the prior right and possession, far outrunning the common-law period of limitation. They have been again and again ejected under judicial process, returning *vi et armis* and in contempt of judicial process. What standing should they enjoy in any court of law or equity, viewed from any legal or moral standpoint?

Under all the circumstances disclosed by the record, the concurring decisions of the Circuit Court and Circuit Court of Appeals are manifestly right and should be here affirmed.

For the convenience of the Court we print the decisions of the Secretary of the Interior rendered in the case in following appendix.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Defendant in Error.

APPENDIX.

A. D. S. M. L. 86271, 1897.
"G." I. R. C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 15, 1897.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of the motion for review of the decision of the Secretary of the Interior, rendered on February 4, 1889, in the case of Joseph Naphtaly *v.* L. L. Bregard *et al.*, involving lands in Tp. 1 N., R. 2 W., and Tp. 1 S., R. 2 W., M. D. M., San Francisco, Cal., land district; also copy of letter of Britton and Gray and Curtis and Burdett of March 1, 1889, filing said motion, and also copy of the proof of service of said motion on B. B. Newman and J. A. Robinson are true and literal exemplifications of said papers on file in this office.

In witness whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] BINGER HERMANN,
Commissioner of General Land Office.

"D."

A. T. BRITTON.
H. J. GRAY.
A. B. BROWNE.
W. W. DUDLEY.

BRITTON & GRAY,
Attorneys and Counselors at Law,
Pacific Building, 622 F Street N.W.
WASHINGTON, D.C., *March* 1*st*, 1889.

Hon. S. M. STOCKSLAGER,
Commissioner of the General Land Office.

SIR: Herewith we have the honor to file motion for review and reconsideration of the decision rendered by the Honorable Secretary of the Interior on February 4, 1889, in the case of Joseph Naphtaly *v.* L. L. Bregard *et al.*, San Francisco, California, Land District, and for reargument of the case. We also file proof of service of said motion on the attorneys of record for Bregard *et al.*

Very respectfully,

BRITTON & GRAY,
CURTIS & BURDETT,
Attys. for Jos. Naphtaly.

DISTRICT OF COLUMBIA, }
City of Washington, } *ss:*

George Brent, being duly sworn, deposes and says: That on March 2nd, 1889, he, for Britton & Gray, mailed, at the City Post Office, Washington, D. C., two registered letters, addressed, respectively, to B. B. Newman, Esq., attorney at law, and J. A. Robinsin, Esq., attorney at law, San Francisco, California, said letters each containing a copy of the motion of Britton & Gray and Curtis & Burdett, attorneys for Joseph Naphtaly, for review, reconsideration, and reargument, before the Secretary of the Interior, in the matter of Joseph Naphtaly *v.* L. L. Bregard

et al., in further evidence whereof the registry receipts therefor are hereto appended.

GEORGE BRENT.

Subscribed and sworn to before me this 2nd day of March, A. D. 1889.

[SEAL.] E. L. WHITE,
Notary Public.

Registered { Letter / Parcel* } No. 5350, P. O., Washington, D.C.

Received 3 / 2, 1889, of Britton & Gray, 622 F St. N.W., a { Letter / Parcel* } addressed to B. B. Newman, San Francisco, Cal.

JOHN W. ROSS, P. M.,
Per BROOKS.

Registered { Letter / Parcel* } No. 5351, P. O., Washington, D. C.

Received 3 / 2, 1889, of Britton & Gray, 622 F St. N. W., a { Letter / Parcel* } addressed to J. A. Robinson, San Fran., Cal.

JOHN W. ROSS, P. M.,
Per BROOKS.

IN THE DEPARTMENT OF THE INTERIOR.

JOSEPH NAPHTALY *v.* L. L. BREGARD *et al.* — Involving lands in T. 1 N., R. 2 W., and T. 1 S., R. 2 W., M. D. M., San Francisco, Cala., Land District.

Motion for Review and Reconsideration of Decision Rendered by the Hon. Secretary of the Interior, February 4, 1889, and for Argument.

Now comes Joseph Naphtaly by Britton and Gray and Curtis, and Burdett, his attorneys in the above-entitled

---

* The word "Parcel" is canceled.—Printer.

matter, and respectfully moves a review and reconsideration of the decision herein rendered by the Hon. Secretary of the Interior on February 4, 1889, wherein the claim of said Joseph Naphtaly to enter the land in question under the 7th section, Act of Congress approved July 23, 1866, was held to be invalid and was rejected.

Such motion for review and reconsideration is based upon the following allegations of errors in said decision, in matters both of fact and of law, appearing upon the face of the record:

1st. Error in ruling that it is impossible to hold that at the time of the passage of the Act of July 23, 1866, there was any person entitled to the pre-emption right conferred by the 7th section of that Act, to the land here in question, as a purchaser in good faith, who had used, improved and continued in the actual possession of specific land as according to the lines of the original purchase.

2d. Error in holding that a purchaser in good faith, within the contemplation and meaning of the 7th section, Act of July 23, 1866, is only one who purchased in the sincere and fair belief that he was acquiring a good title to the land purchased; who is chargeable with no notice of defects in the title which may operate to defeat it, and who is not chargeable with knowledge that he purchased only a speculative title.

3rd. Error in holding that the conveyance from Innocencio Romero and wife to Domingo Pujol and Francisco Sanjurjo of December 26, 1853, shows upon its face that the grantees understood that they were purchasing a title which was *sub judice*, and which was speculative, and that such purchase was therefore not in good faith within the meaning of the statute.

4th. Error in ruling in effect that the purchaser of a

title *sub judice* was not a purchaser in good faith within the meaning of the said 7th section, Act of July 23, 1866, or was, for the purposes of that statute, charged with notice of defects in the title purchased.

5th. Error in holding that the deed from Pujol and Sanjurjo to James W. Tice of February 14, 1855, carried upon its face the same evidence, or any evidence, that a speculative title was the subject of the transfer, and that such purchase was not in good faith within the meaning of the statute.

6th. Error in considering the parol testimony found in the record as in any way modifying the statement of consideration expressed in the last mentioned deed, or as showing that a valuable consideration for the land was not paid by the grantees therein.

7th. Error in holding that the conveyance from Jas. W. Tice to Andrew J. Tice of August 8, 1853, also showed upon its face that a speculative title was the subject of the transfer, and that such purchase was not in good faith within the meaning of the statute.

8th. Error in citing as in any way material to the case the fact that the conveyance made by Andrew J. Tice to Soloman P. Millett of October 17, 1859, was made after the grant claim had been rejected by the District and Circuit Courts of the United States, the case then being on appeal to the Supreme Court, and therefore not finally rejected.

9th. Error in holding that the conveyance of the land by Jas. W. Tice to Uhretta Tice, April 6, 1861, was in any way effective; that, if effective, it was not for a valuable consideration, within the meaning of the said 7th section, Act of July 23, 1866; that same was made after the rejection of the grant claim by the Board of Land Commissioners, by the District Court, and by the Supreme

Court of the United States, and that same was not made in that good faith which the law contemplates.

10th. Error in ruling that the title under the grant had been from the beginning a merely speculative title; that every deed from the original Mexican grantee had carried on its face notice of the defect and of the contingency; that the consideration paid by the several purchasers was not for the land but for stock, with the privilege of a cattle range, in any such sense as to take the matter out from the operation of the said 7th section, Act of 1866.

11th. Error in finding from the record that the conveyances of the grant title were conveyances of an undivided interest only; that there was nothing like definite understanding of a tract of land as conveyed, or which the purchasers could possess according to the lines of the original purchase; that there was no such thing as a well-defined tract of land which the parties could claim to have been fairly conveyed; that there was no exclusive possession by the purchasers; that the boundaries were indefinite and uncertain, and the possession doubtful and contested.

12th. Error in holding that to establish a right of entry under the said 7th section, Act of July 23, 1866, it was necessary for Naphtaly to have shown actual and continuous possession by himself and his grantors of all the land originally conveyed by Innocencio Romero to Pujol and Sanjurjo, and that possession of a portion of the land originally purchased under the grant does not entitle the purchaser to enter under the said Act the portion so in possession.

13th. Error in holding that there is in the record no sufficient evidence of the partition of the grant between the three original claimants, the brothers Innocencio, Jose, and Mariano Romero.

14th. Error in finding from the evidence that after the

title *sub judice* was not a purchaser in good faith within the meaning of the said 7th section, Act of July 23, 1866, or was, for the purposes of that statute, charged with notice of defects in the title purchased.

5th. Error in holding that the deed from Pujol and Sanjurjo to James W. Tice of February 14, 1855, carried upon its face the same evidence, or any evidence, that a speculative title was the subject of the transfer, and that such purchase was not in good faith within the meaning of the statute.

6th. Error in considering the parol testimony found in the record as in any way modifying the statement of consideration expressed in the last mentioned deed, or as showing that a valuable consideration for the land was not paid by the grantees therein.

7th. Error in holding that the conveyance from Jas. W. Tice to Andrew J. Tice of August 8, 1853, also showed upon its face that a speculative title was the subject of the transfer, and that such purchase was not in good faith within the meaning of the statute.

8th. Error in citing as in any way material to the case the fact that the conveyance made by Andrew J. Tice to Soloman P. Millett of October 17, 1859, was made after the grant claim had been rejected by the District and Circuit Courts of the United States, the case then being on appeal to the Supreme Court, and therefore not finally rejected.

9th. Error in holding that the conveyance of the land by Jas. W. Tice to Uhretta Tice, April 6, 1861, was in any way effective; that, if effective, it was not for a valuable consideration, within the meaning of the said 7th section, Act of July 23, 1866; that same was made after the rejection of the grant claim by the Board of Land Commissioners, by the District Court, and by the Supreme

Court of the United States, and that same was not made in that good faith which the law contemplates.

10th. Error in ruling that the title under the grant had been from the beginning a merely speculative title; that every deed from the original Mexican grantee had carried on its face notice of the defect and of the contingency; that the consideration paid by the several purchasers was not for the land but for stock, with the privilege of a cattle range, in any such sense as to take the matter out from the operation of the said 7th section, Act of 1866.

11th. Error in finding from the record that the conveyances of the grant title were conveyances of an undivided interest only; that there was nothing like definite understanding of a tract of land as conveyed, or which the purchasers could possess according to the lines of the original purchase; that there was no such thing as a well-defined tract of land which the parties could claim to have been fairly conveyed; that there was no exclusive possession by the purchasers; that the boundaries were indefinite and uncertain, and the possession doubtful and contested.

12th. Error in holding that to establish a right of entry under the said 7th section, Act of July 23, 1866, it was necessary for Naphtaly to have shown actual and continuous possession by himself and his grantors of all the land originally conveyed by Innocencio Romero to Pujol and Sanjurjo, and that possession of a portion of the land originally purchased under the grant does not entitle the purchaser to enter under the said Act the portion so in possession.

13th. Error in holding that there is in the record no sufficient evidence of the partition of the grant between the three original claimants, the brothers Innocencio, Jose, and Mariano Romero.

14th. Error in finding from the evidence that after the

date of such partition the two brothers, Jose and Mariano Romero, were not in actual possession of the land so set off to them, respectively, and in considering that fact, if established, as in any way material as to the case here under consideration.

15th. Error in holding that the deeds executed by Innocencio Romero and wife; those executed by Jose and Mariano Romero; the petition to the Board of Land Commissioners for confirmation of the claim, and the instrument executed by Innocencio Romero, February 10, 1853, were all, or any of them, inconsistent with the theory of a partition of the grant in 1847 or 1848.

16th. Error in holding that the said partition between the three Romero brothers in 1847 or 1848 was only a temporary arrangement entered into for convenience, and not intended to divest any of them of their undivided interest in the grant; that same could not bind the parties joining in the petition for confirmation, or that this, if true, would be material in this proceeding.

17th. Error in citing the several conveyances of the land here in question made under the grant title, after the passage of the Act of July 23, 1866, as evidencing an expectation that a right of purchase might be secured under that Act; and in considering such expectation, if it existed, as in any way impairing the good faith of the respective purchasers, or the right of entry of the present claimant.

18. Error in failing to consider and cite the fact that by the conveyances of the grant title to Martin Clark, executed March 24, 1869, and April 1, 1869, said Clark took such title in trust for the present claimant, Joseph Naphtaly, as shown by a declaration of trust, executed by said Clark November 8, 1871.

19th. Error in considering the assertion of claims to

the land in question by parties other than those holding under the grant title, since the passage of the Act of 1866, as in any way indicating that the claim of Naphtaly was uncertain, indefinite, and, in regard to its limits, disputed.

20th. Error in holding it to satisfactorily appear from the evidence that no right of purchase of the tract in question was conferred on any person by the Act of 1866, and that Naphtaly acquired no such right as the Act contemplates.

21st. Error in holding, in view of the remedial provisions of the said 7th section, Act of 1866, that the price paid by the respective purchasers of the land in question under the grant title as shown by the several deeds, was only a reasonable price for the possession of the claim, and in considering, as material in the case in any way except as evidencing his possession, the fact that Naphtaly had received rent, in any amount, for the premises held by him.

22d. Error in rejecting the claim of Naphtaly upon grounds not suggested in the decision of the Commissioner, and not raised in argument, as to which he therefore had no notice, and without opportunity to him to be heard thereon.

23d. Error in other matters, both of fact and of law, and in rejecting the application of said Naphtaly to enter the land claimed by him under the said 7th section, Act of 1866.

And the said Joseph Naphtaly, by his said attorneys, further moves that this motion and the said matters be set for argument before the Hon. Secretary of the Interior at such future time as the parties in interest herein may by stipulation, subject to the approval of the Hon. Secretary of the Interior, agree upon, or, in default of such stipulation and agreement, then at such time as may

suit the convenience of the Hon. Secretary of the Interior, and upon due notice to the parties in interest.

CURTIS & BURDETT,
BRITTON & GRAY,
Attys. for Joseph Naphtaly.

WASHINGTON, D. C., *March 1st*, 1889.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

H. J. Gray, of the firm of Britton & Gray, one of the attorneys for said Joseph Naphtaly in the above-entitled matter, being duly sworn, deposes and says: That the foregoing motion for review and reconsideration and for reargument of the said case is made in good faith, and is not for the purpose of embarrassment or delay.

H. J. GRAY.

Subscribed and sworn to before me this 1st day of March, A. D. 1889.

ROBINSON WHITE,
Notary Public.

APPENDIX.

RIGHT OF PURCHASE UNDER SECTION 7, ACT OF JULY 23, 1866.

NAPHTALY *v.* BREGARD ET AL.

The right of purchase conferred by the seventh section of the act of July 23, 1866, is subject to the following conditions: (1) the claimant must have purchased the land from Mexican grantees or assigns; (2) the purchase must have been made in good faith and for a valuable consideration; (3) the claimant must have used, improved, and continued in the actual possession of the land according to the lines of original purchase; and (4) no valid adverse right or title, except that of the United States, should exist.

A purchaser in good faith is one who purchases in the sincere belief that he is acquiring a good title to the land purchased, and who is not chargeable with notice of defects in the title, which may operate to defeat it, or with knowledge that he purchases only a speculative title.

The right of purchase conferred by said section does not relate back to former claimants, but extends only to persons then holding lands which they had purchased in good faith, and for a valuable consideration before the rejection of the grant, and who had used the land so purchased, improved it, and continued in the actual possession thereof within defined limits, from the time of their purchase to the date of the act.

The preferred right of purchase from the government is conferred only upon one who has purchased from Mexican grantees or assigns a definite tract of land, or such a tract as may be defined by the terms of the grant. The conveyance of an undivided interest, in the absence of evidence showing partition or actual occupation within definite limits, will not carry with it the right of purchase.

Secretary Vilas to Commissioner Stockslager, February 4, 1889.

I have before me on appeal from the decision of your office, dated March 2, 1887, the case of Joseph Naphtaly *v.* L. L. Bregard and others, involving the question of Naphtaly's right to purchase under section seven, act of July 23, 1866, some twenty-one described tracts of land in T. 1 N., and T. 1 S., R. 2 W., M. D. M., California.

The township plats of survey for said townships were filed in the local office on July 30, 1878, for township one south, and on October 5, 1878, for township one north. These plats were withdrawn October 24, 1878, restored February 24, 1882, suspended March 9, 1882, and the suspension removed April 16, 1883.

Naphtaly filed his application to purchase August 10, 1883. Mary A. Jones—one of the defendants herein—on July 16, 1883, applied to purchase under the same act, a portion of the land included in Naphtaly's application. The right to purchase is based on an alleged Mexican grant to three brothers, Innocencio, Jose, and Mariano Romero.

Naphtaly claims title under Innocencio Romero and Mrs. Jones under Jose Romero.

These applications to purchase are resisted by divers parties who assert rights under the timber-culture and settlement laws and by the Western Pacific Railroad Company.

Mary A. Jones, in addition to claiming a right to purchase under said act, claims a certain part of the land in controversy under the homestead laws. She alleges settlement in 1866 and continuous residence since that time on the land claimed as a homestead. Some of the other defendants allege settlement in 1875, and final certificates

have been obtained in several cases of soldiers additional homestead entries. Some of the defendants are simply applicants to file or enter, while others have tendered final proof and claim compliance with the settlement laws and the right to final certificates.

The land involved is within the twenty-mile limit of the reservation of January 30, 1865, for the Western Pacific Railroad, and the greater part of sections nine and fifteen is within the Highley survey of the Moraga grant.

The local office decided that the odd sections and parts of odd sections involved herein, and not included within said survey, belonged to the railroad; and that Naphtaly was entitled to purchase under the provisions of said act, the balance of the land described in his application. The decision of your office reverses the decision of the local officers, rejects the applications to purchase, and leaves the questions as to the rights of the Western Pacific Railroad and other claimants to future adjudication.

Naphtaly, Mary A. Jones, and the heirs of John M. Jones, deceased, have appealed.

The application of Mary A. Jones, widow and devisee of John M. Jones, deceased, may properly be considered in this case, as she has submitted evidence herein in support of her supposed right to purchase under said act a certain portion of said tract claimed by Naphtaly. The homestead claim of said Mary A. Jones, and the various claims of the other numerous defendants herein, are considered only so far as they affect the claimed right of said applicants to purchase under the act of July 23, 1866. So far as said various claims for different portions of the land involved conflict with each other, they have not been and will not be considered herein.

The claim of each of the applicants is based on the same alleged Mexican grant, and are so alike in some of their

essential features that the conclusion reached in the Naphtaly case disposes of the case of Mrs. Jones.

The seventh section of the act of July 23, 1866 (14 Stat., 218), is as follows :

"That where persons in good faith and for a valuable "consideration have purchased lands from Mexican "grantees or assigns, which grants have subsequently "been rejected, or where the lands so purchased have "been excluded from the final survey of any Mexican "grant, and have used, improved, and continued in the "actual possession of the same as according to the lines "of their original purchase, and where no valid adverse "right or title (except of the United States) exists, such "purchaser may purchase the same, etc."

Said applications were rejected by your predecessor in office, on the ground, (1) That there was no grant or semblance of a grant by Governor Micheltorena to the Romeros as claimed, and consequently, that appellants were not purchasers in good faith "from Mexican grantees or assigns." And (2) That the act only applies to parties who purchased prior to the rejection of the supposed Mexican grant, and that as Naphtaly admittedly purchased long subsequent to the final rejection of the Romero brothers alleged grant, he has not brought himself within said act.

Appellant, Naphtaly, by his counsel, insists that your office erred in so deciding, and claims that he has shown by the evidence in the case, (1) Such a grant, made in 1844 by Governor Micheltorena to the Romeros, as is intended by the term grant as used in said act. (2) A parol partition of the land so granted between the three brothers, some time in 1847 or 1848, and an allotment at that time of the land in controversy to Innocencio Romero. (3) The use, improvement, and continued actual possession in severalty by Innocencio Romero of the land so allotted to

him from the time of said partition up to December 26, 1853.

(4) The purchase of said land—excepting such portions as had been sold prior thereto—from said Innocencio on December 26, 1853, by Domingo Pujole and Francisco Sanjurjo in good faith and for a valuable consideration.

(5) The use, improvement, and continuous actual possession by said Pujole and Sanjurjo, of the land so purchased, by them, from the date of purchase, and according to the lines of their purchase, up to February 14, 1855.

(6) That on February 14, 1855, Pujole and Sanjurjo conveyed the same tract to James William Tice; that on August 18, 1855, said James William Tice conveyed the same to Andrew J. Tice; that on October 14, 1859, said Andrew J. Tice conveyed same to S. P. Millett, and that on October 17, 1860, said Millett conveyed same to the aforesaid James William Tice; and that the title remained in said James William Tice until long after the passage of said act of July 23, 1866—to wit, until April 1, 1869. And that each of said parties purchased said land in good faith and for a valuable consideration; and during the time they each held title, they each used, improved, and maintained the continuous actual possession of said tract of land according to the lines of their original purchase.

Assuming the foregoing facts to be proven, the applicant, Naphtaly, claims that James William Tice had, any time between July 23, 1866, and April 1, 1869—had said tract been subject to entry—the unquestioned preference right to purchase the same and that such right is assignable.

Naphtaly further claims that the evidence shows a complete chain of title from James William Tice to himself, and that he and each of the intermediate grantees pur-

chased in good faith and for a valuable consideration, and that each of said grantees, during the time they respectively held title to said tract of land, used, improved, and maintained a continuous actual possession of the same, and therefore that he has the preference right to purchase said tract under the act of July 23, 1866.

The documentary evidence produced in support of the Romero claim before the Board of Land Commissioners and the courts shows: A petition by claimants, dated January 18, 1844, to Micheltorena, then governor of California, for a tract of land described as the sobrante of the three ranchos of Moraga, Pacheco, and Will, situated in what is now Contra Costa county, California. A direction on the margin of said petition signed "Micheltorena" that the Secretary of State report, "having first taken such steps as he may deem necessary." A direction, signed Manuel Jimeno, to the alcalde of San Jose that he summon said Moraga, Pacheco and Will that they may be heard in the matter, and that he report; a report of the alcalde dated February 1, 1844, that the petitioners and said land owners "having been confronted, the latter said that the Senors Romero did not prejudice them in any way, but on the contrary that they desired them to be their neighbors . . . . It has also come to the knowledge of this tribunal that one Francisco Soto claimed the tract in question some six or seven years ago. But in this time he has neither used nor cultivated it in any way to gain any right thereto. Wherefore the petitioners appear to me entitled to the favor they ask." A report by the Secretary of State to the governor dated February 4, 1844, that "it would seem there is no obstacle to making the grant . . . if your excellency approves of it." A direction by the governor (February 28, 1844,) that the land be measured in the presence of the adjacent pro-

rietors and the result certified "so that it may be granted o the petitioners." A second petition by the Romeros, ated March 21, 1844, in which it is represented that the oregoing order had not been executed "for the reason hat the owners of the neighboring lands . . . . were bsent and engaged," and asking that the said grant be nade "either provisionally or in such a manner as your xcellency shall deem fit." A recommendation by the ecretary of State (Jimeno) as follows: "I think Y. E.'s rder should be carried into effect in regard to the measur- ng of the land that is claimed, and as soon as this is ac- omplished, with the least practicable delay, Senor Romero an present himself joined with Senor Soto, who says that e has a right to the same tract. Your Excellency's uperior discernment will determine what is best." This ecommendation is dated March 23, 1844, and on it appears he following: "Let everything be done agreeably to the oregoing report." "Micheltorena."

The Mexican archives do not show that any further steps ere taken in the matter by the Romeros, but parol testi- nony was produced in the prosecution of their claim be- ore the United States courts tending to show that in fact grant as asked had been issued to them by Governor Micheltorena.

The Romero claim was presented to said Board on February 28, 1853, and rejected on April 17, 1855. It was ubsequently rejected by the United States district and ircuit courts, and finally, at the December term, 1863, by he supreme court (Romero *v.* United States, 1 Wall., 21). These decisions were all made on the ground that he supposed grant was never issued.

In order to the enjoyment of the right of purchase under he act of 1866, it is necessary that the claimants of the re-emptive right should first have purchased the lands

from Mexican grantees or assigns; secondly, that such purchase should have been made both in good faith *and* for a valuable consideration; thirdly, that they should have used, improved and *continued* in the actual possession of the same *as according to the lines of their original purchase;* and fourthly, that no valid adverse right or title (except of the United States) should exist.

The supreme court have determined that there was no Mexican grant to the Romeros, and the Commissioner, therefore, held that the Romeros were not Mexican grantees. In view, however, of the fact that this is a remedial act, designed for the protection of parties who supposed they were buying a good title from a Mexican grantee, I am not prepared to hold that, if the other conditions exist, this is such a case as would deny the right upon this ground alone. An examination of the report of the decision of the supreme court shows that a grant was claimed to exist upon the testimony of witnesses who were intelligent and skilful in the law and affirmed that they had seen such a grant in due compliance with Mexican law and usage. I am disposed rather to place the affirmance of the Commissioner's decision upon other grounds, in respect to which the fact finally decided by the supreme court is of consequence as a matter of evidence upon the question of good faith.

It seems to me impossible to hold that at the time of the passage of the act of 1866 there was any person entitled to the pre-emptive right as a purchaser in good faith who had used, improved and continued in the actual possession of specific land as according to the lines of the original purchase.

A purchaser in good faith is one who purchases in the sincere and fair belief that he is acquiring a good title to the land purchased, and who is chargeable with no notice

defects in that title which may operate to defeat it, and pecially one who is not chargeable with knowledge that purchases only a speculative title. The facts of this e, especially when taken in connection with the final cision that there was no grant at all, repel the presumption that this belief could have been entertained by the ginal purchasers from Innocencio Romero. No conyance had been made at the time when the petition to Board of Land Commissioners for confirmation of the eged grant was presented, which was on the 28th of bruary, 1853. The first conveyance upon which this erest is founded was t Innocencio Romero and wife, Domingo Pujole and I ncisco Sanjurjo. The conveyce from Romero and w. e to these parties was made on e 26th of December, 1853, ten months substantially, er the petition for confirmation was presented, and it ows upon its face that the parties understood that they re purchasing a title which was *sub judice* and which s speculative. I quote from the deed the material rts, as follows:

" *Witnesseth*, That the said parties of the first part for, nd in consideration of the sum of ($5,325) five thousand three hundred and twenty-five dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part, ... have granted, etc., and by these presents do grant, bargain, sell, release, remise and convey unto the said parties of the second part, and to their heirs and assigns forever, all the *undivided one third* of the lands and ranchos in said Contra Costa county and State aforesaid, being the said lands and rancho granted to the party of the first part and his two brothers, Jose Romero and Mariano Romero, by Governor Micheltorena in the year 1844, and being also the same lands and rancho the claim for which is now numbered six hundred and fifty-six on the docket of the Board of the United States Land Commis-

" sioners appointed to ascertain and settle private land " claims in California, reference being had to the papers " and proofs on file in said case for a more particular de- " scription of the lands and premises hereby intended to " be conveyed.

" And it is expressly understood and reserved by the " parties of the first part and assented to and agreed to by " the parties of the second part, that in the event that said " lands and rancho shall hereafter be confirmed by said " Board of United States Land Commissioners, then the " said parties of the second part, their heirs and assigns " shall pay to the parties of the first part the further con- " sideration of ($3,000) three thousand dollars."

No covenants of warranty for the title were contained in the deed.

On the 14th of February, 1855, Pujole and Sanjurjo made a deed to James William Tice which, except that the express consideration was eight thousand dollars instead of five thousand three hundred and twenty-five dollars, is in all essential particulars the same as the foregoing, and carries upon its face the same evidence that a speculative title was the subject of the transfer.

In the technical sense of the law, the consideration was "valuable" because it was of money. But, as affecting the question of good faith, it appears from the evidence that the consideration was not truly stated in the deed, and was very much smaller, so far as it was a considera- tion for the land at all. It does not disclose how much of the real consideration was for the landed interest, but it does appear that it was quite insignificant. Innocencio Romero says he "sold land, cattle and horses." Ignacio Sybrian says that land "together with all the cattle and horses" was sold. Manuel Sybrian says that Romero sold the "land, cattle, horses, houses, and everything there was upon the ranch." This testimony was all introduced by

the applicant Naphtaly. John A. White, a witness introduced on the part of defendants, says that he and James M. Tice, who is shown by the evidence to have been the father of the said James William, were associated in business in the spring of 1855, under the firm name of Tice and White; that the firm bought of Purjole and Sanjurjo the Romero ranch, together with about one hundred head of cattle, one hundred head of horses, and sheep, and a few goats; that the consideration was placed nominally at eight thousand dollars, but did not in fact exceed three thousand five hundred dollars; that the stock was estimated to be worth the money paid, or perhaps a little less, and that not much value was put on the land; that he occupied the land for two or three days, had some trouble with James M. Tice and told him he could have the land, and that the land was conveyed to James William Tice, who was then over twenty-one years of age. There is no impeachment of the witness or contradiction of his testimony. At the time this purchase was made the claim had been nearly two years pending before the Board of Land Commissioners, presumably the evidence had been submitted and the risk of the result must have been apparent. But three days over two months passed when, on the 17th of April, 1855, the Board refused confirmation of the grant.

Subsequent to the rejection of the grant, James William Tice conveyed to Andrew J. Tice, August 8, 1855, by a deed in substantially the same terms as that already quoted, the nominal consideration expressed being eight thousand dollars.

After that the claim was considered by the district court and the circuit court of the United States and rejected by both. With these further evidences of the invalidity of the claim, the next conveyance was made for the considera-

tion nominally, of one thousand dollars only, by Andrew J. Tice to Solomon P. Millett on the 17th of October, 1859, with the reservation of one hundred and sixty acres described by metes and bounds, on which the grantor and his family were said to reside.

On the 13th of December, 1860, Millett for the same expressed consideration conveyed the same interest back to James William Tice.

Finally, on the 6th of April, 1861, James William Tice conveyed the interest derived by his deed from Millett to Urhetta Tice, his mother, for the consideration of love and affection and her better support and maintenance. This appears to be the last conveyance before the passage of the act of 1866. So far as disclosed by the proofs, whatever right of purchase was given by the act of 1866 if any, it carried to Urhetta Tice as the then holder of this claim.

I think it a clear interpretation of the act of 1866, that it had no relation back to any former claimants, but gave the pre-emptive right only to persons then holding lands which they had purchased in good faith and for a valuable consideration, before the rejection of the grant, and when they had used the land so purchased, improved it and continued in the actual possession of it within defined limits from the time of their purchase to the date of the act.

It thus appears that Urhetta Tice had not purchased it for a valuable consideration, technically speaking, but only for a "good" consideration; that she purchased, so far as the conveyance to her can be called a purchase, after the grant had been rejected by the Board of Land Commissioners, by the district court, and by the supreme court of the United States, and while the case was depending upon appeal in the supreme court. If the conveyance to her were for a valuable consideration, it could not, under these circumstances, be held to be also made in that "good

faith" which the law contemplated. It had been from the beginning a merely speculative title, and every deed from the original alleged Mexican grantee had carried upon its face notice of the defect and of the contingency, and charged the purchaser with an additional payment if the contingency eventuated favorably. The consideration paid, even in the earlier purchases, was not for the land, to any sensible degree, but for stock, with the privileges of a cattle range, which the claim of the grant afforded to the holder.

Besides these defects, the case does not meet the third condition of the law. That evidently contemplated the purchase of a definite tract of land, or at least of a tract capable of definition from the terms of the grant. This was the conveyance of the undivided interest only, and from the circumstances hereafter detailed, it is evident that there was nothing like definite understanding of a tract of land as conveyed, or which the parties could possess, according to the lines of their original purchase." Accordingly, it is manifest from the testimony and history of the case that there was no such thing as a well defined tract of land which the parties could claim to have been fairly conveyed as upon a perfect title; and it appears from the various claims which have been established upon this land that there was no such thing as an exclusive possession, according to the lines of an original grant. The possession appears to have been doubtful and contested to a greater or less degree, and especially the boundaries were indefinite and uncertain.

The evidence shows that the alleged Romero grant had no known or fixed boundaries, and that the quantity of land included therein was necessarily indefinite. What the sobrante or surplus claimed might prove to be could only be determined by a survey of the ranchos named in

the Romero petition, and by having their boundary lines definitely fixed, and no such survey or fixing of lines appears to have been made under Mexican authority, nor until the grants for said rancho were finally confirmed by the United States government. Innocencio Romero claimed that the grant was for from four and a half to five leagues of land, and that from a league and a half to two leagues of the granted lands were allotted to him in severalty by his brothers at the time of the alleged partition in 1847 or 1848. This would make from about six thousand to about eight thousand acres allotted to Innocencio Romero in and by said partition. Naphtaly says he bought about three thousand acres of this alleged allotment. The deed to Domingo Pujole and Sanjurjo as we have seen, was for an undivided third interest in the lands alleged to have been granted to the Romero brothers, and Innocencio says it conveyed the same land allotted to him "except " some small parcels within the exterior lines which I had " sold to others before." The subsequent intervening conveyances down to and including the conveyance to Naphtaly are for an undivided one-third interest in the Romero grant, and under the theory that the deed to Pujole and Sanjurjo vested the entire title of Innocencio to lands held in severalty by him, each of the subsequent purchasers took the same quantity and by the same lines as the original purchasers. They would, therefore, to bring themselves within the statute, be required to show use, occupation, and the continued actual possession of the land so conveyed according to the lines of Pujole and Sanjurjo's purchase. This the evidence does not show. Naphtaly says he claims probably two or three thousand acres; that his purchase included three hundred and fifty-seven acres of the San Ramon, and that the houses, barns, and buildings are on the San Ramon grant. The San Ramon, it

appears from the evidence, was a confirmed Mexican grant, lying on the east and northeast of the land in controversy, for which a patent issued April 7, 1866.

It appears in evidence also that the west line of the tract claimed to have been purchased by Pujole and Sanjurjo has been moved in and further east than it was at the date of said purchase. How far this line has been moved in since that time does not appear, but one of Naphtaly's witnesses says that the land claimed by him is a great deal less than the Tices (who purchased in February, 1855), took possession of.

The evidence taken altogether clearly shows that possession of the land claimed to have been conveyed to Pujole and Sanjurjo, and from them through intermediate conveyances to Naphtaly, has not been continuously maintained by him and his immediate and more remote grantors, according to the lines of the Pujole and Sanjurjo purchase as such lines are claimed to have been pointed out and designated by said Innocencio at the time said conveyance was made.

No documentary evidence of any character is produced to show, or which tends to show, that this claimed grant of unknown boundaries, was ever partitioned by the Romero brothers. Nor is it pretended that at the time of the alleged partition any lines of survey were run, or any permanent monuments erected, or any artificial marks of any kind made to show the lines separating the lands of one brother from those of the other brothers. That co-tenants who did not know the boundary lines of their joint property, nor its area in leagues or acres, and who were liable to have their portions allotted in lands to which they had no title, should meet together and divide the joint property among themselves and by such division each divest himself absolutely of all title to such property, except as to

the portion allotted to himself, is so contrary to our experience and observation as to how men usually act in matters of such importance to themselves as to render the alleged fact highly improbable. To gain credit, therefore the fact alleged should be clearly proven by the most satisfactory evidence, and the evidence in support of the alleged partition, after careful consideration, is found to be weak and unsatisfactory. The testimony of only two persons who profess to have been present at the time of the alleged partition is offered in evidence—to wit, Innocencio Romero and Ignacio Sybrian. Romero says that he and his brothers made an absolute partition of the land granted to them some time in 1847 or 1848; that he took the westerly portion, Jose the easterly, and Mariano the north-easterly, and that the ridges and arroyos were selected as boundaries; that he occupied the land until he sold to Pujole and Sanjurjo in Dec., 1853, and that his brothers went to live on their own land, and sold their portions as he did his.

Sybrian testifies that he was present at the time the partition was made, that Innocencio was then in possession; that his brothers visited him occasionally and that there was no house on the land but Innocencio's and that no one else built a house on the land; that Mariano lived in Monterey, Jose in San Jose, and that neither lived on the ranch; that neither of them had a house, and that he does not believe either of them occupied any portion of the ranch after the division; heard they had sold, and that Ramon Pico lived on Mariano's part and Otoyo on Jose's, and that the division was made into three parts, without survey, by designating natural objects.

These two witnesses agree substantially on the natural objects which marked the lines of the tract alleged to have been allotted to Innocencio; and Sybrian says that the lines shown to Pujole at the time of the sale to him and

Sanjurjo were the same, except that some land had been previously sold by Innocencio.

A number of witnesses testify that they heard of this partition and that it was recognized by the parties and by the neighbors. That Innocencio's right to the possession of all the land alleged to have been allotted to him was not recognized by all the neighbors is clearly shown. It will be observed too that Innocencio Romero and Sybrian contradict each other as to the important fact about Jose and Mariano taking formal possession of, and going to live on, their respective portions; and Romero is flatly contradicted by the weight of the testimony as to the location of Mariano's portion. The testimony satisfactorily shows that from 1846 to 1852 Jose lived at the mission of San Jose, and that he was what some of the witnesses called a major-domo of the mission. In an affidavit offered in evidence, Mariano swears that between 1844 and 1852 he had never seen his brother Innocencio. In addition to this, all the documentary evidence is utterly inconsistent with the theory that there was an absolute partition of the land claimed by the Romero brothers. All of the deeds to this land made by Innocencio were for an undivided interest. The deeds made by the other brothers were also for undivided interests. Innocencio and Jose Romero, Francisco Otoyo, Alvin Campbell, James Thompson, William Mitchell, John M. Jones, C. Yeager and Miguel Garcia were the parties who presented the petition for the confirmation of the alleged Romero grant to the Board of Land Commissioners and they all represented that they held undivided interests therein, Innocencio Romero claiming an undivided third interest.

The evidence satisfactorily shows that the following instrument was executed on the day it purports to have been, that the signature thereto is the genuine signature of the said Innocencio Romero—to wit:

"MARTENEZ, CONTRA COSTA CO.,
"*February* 10, 1853.

"I, Innocencio Romero agree that in the division and "partition of the Sobrante grant or claim, claimed and "owned by myself, Garcia, Otoyo, Thompson, Mitchell, "Jones and Yeager, that the land heretofore granted by "me to Robert N. Wood by deed duly of record, shall "be partitioned off and allotted to me in said division "first in order after my homestead of one hundred and "sixty acres.

"Given under my hand and seal the day and date "above written.

"INNOCENCIO his × mark ROMERO.

"Witness:

"EDWARD WILLIAM GRAHAM."

The deed referred to was executed October 16, 1852, and conveys to said Wood by metes and bounds, a certain portion of the alleged Romero grant, and the parties named by Innocencio as owners of said grant with him, claimed under Jose in said petition for the confirmation of the grant.

If there was ever any kind of a partition of the land claimed by the Romero brothers between them, it appears clear to my mind that it was only a temporary arrangement entered into for convenience and not intended to divest any of them of their undivided interest in the alleged grant. It certainly could not bind the parties joining in the petition for the confirmation of said grant.

When the act of 1866 was passed it would appear that some new vitality was given to the claim by virtue of the expectation that a right of purchase might be secured under that act, and on the 13th of May, 1868, there appears a deed from Urhetta Tice, James W. Tice, Andrew J. Tice, and Solomon P. Millett and wife, to

David P. Smith, which, for a consideration of seven thousand dollars, purported to convey the interest of the first parties in sections 2, 3, 4, 9, 10, 11, 14, 15 and 16, Township 1, South, Range 2, West, M. D. M., describing the land by metes and bounds, and stated to be supposed to contain 1,767.86 acres; to which is added

"*Also*, all of the lands, of which the foregoing are "supposed to be all or a part, included within the "boundaries of a certain claim formerly known as the "Romero, supposed to have been granted in the year "1844 by Micheltorena, Governor of California, to "Innocencio, Jose, and Mariano Romero, which was "presented for confirmation to the United States Land "Commissioners . . . . . and was afterwards "rejected. There is expressly excepted from the land "conveyed by this instrument as follows: One hundred "and sixty acres now or formerly owned, or claimed and "occupied as a homestead, by the said Andrew Jackson "Tice, and supposed to be the S. W. ¼ of Sec. 3, afore-"said. Together with all and singular the tenements, "rights, privileges and appurtenances thereto belonging, "including the interest and rights of each and every one "of said parties of the first part as pre-emptors or settlers "or otherwise, and all the benefits that have been or are "to be derived under any and all acts of the Congress of "the United States."

On the 25th of February, 1869, David P. Smith conveyed the same lands to John R. Spring, for a stated consideration of five hundred dollars. On the 24th of March in the same year, Spring conveyed to Martin Clark, for a stated consideration of four thousand five hundred dollars; and on the 15th of May, 1876, Martin Clark conveyed the same to Joseph Naphtaly, for a stated consideration of five dollars.

Meantime, the various claims of other parties to this suit had attached in different ways, all indicating that the

nature of the claim of Naphtaly was uncertain, indefinite, and at least in regard to its limits, disputed.

Admitting that the right of purchase given by the act of 1866 could be transferred, it appears satisfactory from the evidence that no right of purchase of this tract was conferred on anybody by that act, and that Naphtaly acquired by the conveyances described no such right as the act contemplates.

It is not a matter furnishing any special evidence of good faith that a price was paid for the possession of the claim and such of the land as has been occupied under it. The possession of it as a mere claim appears to have been of sufficient value to warrant the payment of the consideration mentioned in any deed, or so far as disclosed in fact, of any transfer, to the extent that possession has been maintained. It is shown that Naphtaly has received in rent for so much of the premises as he held possession of, for a part of the time twenty-five hundred dollars a year, and for the remainder two thousand dollars a year. To those acquainted with the country, the value of the possession of such a claim is sufficiently well known to account for all the money that appears to have been in any case paid for it.

The same considerations which relate to Naphtaly deny the right of Mary A. Jones to her claim of purchase under the act.

Your decision rejecting the application is affirmed.

MEXICAN PRIVATE CLAIM—ACT OF JULY 23, 1866.

NAPHTALY *v.* BREGARD ET AL.

ON REVIEW.

Under a parol partition of a Mexican grant, in which each party thereto holds undisturbed possession according to the lines of such partition, and sells and conveys the lands thus received, the grantee of such Mexican claimant acquires the right of purchase under section 7, act of July 23, 1866, so far as the question of definite boundaries is concerned, even though in the instrument of transfer said lands are described as an undivided interest.

A hearing directed to determine the character of the title held by the grantee of the Mexican claimant at the date of the passage of said act.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 23, 1891.

I have considered the motion for review of departmental decision of February 4, 1889, in the case of Joseph Naphtaly *v.* L. L. Bregard *et al.* (8 L. D. 144), involving the question of Naphtaly's right to purchase under section seven of the act of July 23, 1866, certain described tracts of land in T. 1 N., and T. 1 S., R. 2 W., M. D. M., San Francisco, California.

After a lengthy trial, during which much testimony was taken, the local officers rendered a decision in which they rejected the pre-emption and homestead claims of Bregard *et al.*, awarded certain tracts to the Central Pacific Railroad Company, successors to the Western Pacific Railroad Company, and recognized the right of Naphtaly

to purchase the balance of the land embraced in his application.

Your office rejected the application of Naphtaly to purchase on the ground (1) that there was no grant to the Romeros under whom Naphtaly claimed, and consequently, that he was not a purchaser from a "Mexican grantee or assign," and (2) that the act only applied to parties who purchased prior to the rejection of the supposed Mexicant grant, and as Naphtaly purchased subsequent to the final rejection of the alleged Romero grant, he was not within the statute. My predecessor, Secretary Vilas, overruled your office on both these points, but he rejected the application to purchase principally on the ground that at the date of the passage of the act July 23, 1866, no person possessed the qualifications of a purchaser under said act, and that Naphtaly acquired by conveyance no such right as the act contemplates. This conclusion was based upon the fact that at the date of the passage of the act, the title to the tract in question was in Uhretta Tice, and that she was not a purchaser for a valuable consideration for the reason that said land was conveyed to her by her son for the consideration of love and affection and her better support, maintenance and protection. My predecessor also found as a matter of fact, that the purchase from the Mexican grantee, was not in good faith, and was not for a specific and well defined tract of land.

In the motion for review numerous grounds of error are assigned both in the findings of matter of fact and of law.

Section seven of the act of July 23, 1866 (14 Stat. 218), under which Naphtaly makes application to purchase provides—

"That where persons in good faith and for a valuable "consideration, have purchased lands from Mexican gran- "tees or assigns, which grants have subsequently been "rejected . . . . . and have used, improved, and con- "tinued in the actual possession of the same as accord- "ing to the lines of their original purchase, and where "no valid adverse right or title (except of the United "States) exists, such purchaser may purchase the same."

I do not deem it necessary to give in detail the history of the Romero grant. Application was made to the Mexican governor of California in 1844, by three brothers, Innocencio, Mariano and Jose Romero, for a grant of land. Certain proceedings, usual in such cases, were had looking to the granting of the request. The brothers went into possession of the tract petitioned for, occupied the same for years, and finally sold it, the different brothers disposing of different portions of the entire tract.

On December 26, 1853, Innocencio Romero and his wife sold to Domingo Pujol and Francisco Sanjurjo

"all the undivided one-third of the lands and rancho in "said Contra Costa county and state aforesaid, being the "said lands and rancho granted to the parties of the first "part and his two brothers, Jose Romero and Mariano "Romero, by Governor Micheltorena in the year 1844 "etc."

It is alleged that there was a partition of this grant between the three brothers in the year 1846, 1847 or 1848, and that the tract sold by Innocencio was the portion set off to him. This partition is denied by Bregard *et al.* Some contradictory evidence is submitted on this point, but in my opinion, the great preponderance of evidence is to the effect that such a partition was actually agreed upon and made by the brothers.

The testimony of Innocencio Romero and other wit-

nesses, taken in 1875 by order of the judge of San Francisco county is positive. Romero testified that he, his brothers, Ignacio Sybrian, and his little son, rode over the land and "divided some of the land between us three," that they marked the boundaries and lines of each brother's piece, the well known points of land, the ridge and arroyos were selected as boundaries, that he took the westerly portion, Jose took the easterly portion and Marianc the northeasterly portion.

Ignacio Sybrian testified that he was present with the three brothers when they divided the grant among themselves in the year 1847 or 1848, that the lines of each portion were established and pointed out and each of the brothers occupied the portion set off to him and sold the same, and the right of each brother to the portion set apart was recognized by all, that the tract sold to Pujol and Sanjurjo was the portion set apart to Innocencio. At the hearing before the local officers the same witness testified to substantially the same facts, that Innocencio took his portion to the west, Mariano on the east, and Jose on the north or northeast.

Manuel Sybrian testified that he had known the land since 1850, that he was present when Innocencio Romero delivered possession of the land he had sold to Pujol, that he delivered possession of what was then called the Innocencio Romero ranch, and in describing the tract of which possession was given, he recites the same boundaries as were given by Innocencio Romero and Ignacio Sybrian in describing the portion set apart to the former.

Samuel S. Kendall testified that he was living on a portion of the land in dispute in 1852 in a cabin, that Romero in company with Moraga came to his cabin and told him that he was on his land, and at that time in the presence of Moraga described to him the boundaries of his claim,

and in reciting these boundaries the witness gave in substance the boundaries above mentioned as given by Romero and Ignacio Sybrian, and he asserts that no one was in possession of said tract except Romero.

Jose Ramon Pico testified that he was acquainted with the Romero brothers and with the land in 1844 or 1845, that the grant was divided between the three brothers some time after 1845, that his father purchased the portion that was allotted to Mariano in 1851, viz., the southeastern portion of the grant, that Jose took the northeastern and Innocencio the northwestern portion.

D. P. Smith, a witness, and also associate counsel for Bregard *et al.* in the present case, was a witness before the local office in the case of Hyatt *v.* Smith on May 12, 1870. His evidence given at that time, has been made a part of the record in this case. He purchased in 1853 a portion of the tract which had been allotted to Jose, and he states that he knew from Innocencio Romero, and from other purchasers, that the ranch had been divided, that "Innocencio and Mariano had the south part of the valley, Jose had the north part or the northeast part."

On December 19, 1882, my predecessor rendered a decision in the case of Hyatt *v.* Smith, in which it was said "evidence established the fact that a parol partition of "the tract was made between the three brothers and that "Innocencio and Mariano took one part and Jose an-"other."

Counsel assert that the evidence of partition in the case of Hyatt *v.* Smith and the present case is irreconcilable, either that the evidence in the former case is untrue or that in the present case. I do not think such a conclusion follows. Smith the principal witness in the former case testified as above recited; the fact sought to be established in the case then under consideration was that a

portion of the grant had been allotted to Jose and my predecessor so found, but it does not follow that his finding was that neither Innocencio nor Mariano had a portion allotted to them.

Counsel for Naphtaly file certain affidavits with their argument in support of the motion for review.

One made May 14, 1889, by Jose Joaquin Romero, who states that he is fifty-nine years of age, and is the son of Innocencio Romero, that he knew that his uncles and his father divided the grant between themselves, that to his father came the piece of land lying south of Walnut Creek east of the Chuchilla de las Trampas and the eastern boundary of the land was the range of hills that run south from the hill near his father's house. (This is the same description of the tract in substance as is given by the other witnesses to the partition). He further states that his father was in the exclusive possession of this land after the division between himself and his brothers, that Jose's land was east of his father's, and Mariano's about southeast, that his uncles sold their portion, that "they were friendly with us and until we moved from the "ranch in 1853, or 1854, they very frequently visited us in "the adobe house on the ranch. I knew old Mr. Tice very "well, the land I refer to was once held by him and his "sons. My father died in 1878."

N. B. Smith made affidavit June 4, 1889, as follows:

"I reside in Contra Costa county where I have lived "since 1846. In the year 1850 or 1851, I bought from "Innocencio Romero, a tract of land in Contra Costa "county, of what was then supposed to be a part of what "was known as the 'Romero Grant,' at that time and for "years before it was believed that the three brothers "Romero had obtained from the Mexican authorities, a "grant of about five leagues, situated near the Moraga

" ranch, on the east of it. When I bought from Inno-
" cencio, I bought a segregated parcel of land near Wal-
" nut Creek, I took a deed from Innocencio only because
" it was notorious in the neighborhood, and I had been
" told by both Innocencio and Jose Romero, whom I
" knew very well, that the three brothers Romero, who
" claimed to own the grant, had divided the land which
" they took possession of under the grant among them-
" selves, and that the part I was then buying had fallen
" to Innocencio and that his two brothers had no interest
" in it. I was also informed that Innocencio's part was the
" tract of land lying south of Walnut Creek, east of the
" Maraga and west of a range of hills that is nearest to
" the Alamo road, and south near Sugar Loaf canon. I
" knew the two Spaniards to whom Innocencio sold what
" he had left of his part of the ranch. It was the same
" land that the Tices bought and was afterwards called
" the 'Tice' ranch.

" It was a common thing in the early times of California,
" before and after California was admitted in the Union,
" to divide lands held in common by the people going on
" the land and each selecting his share of the land. If I
" had not known from the Romero brothers that they had
" partitioned the land among themselves, and that Inno-
" cencio's share included the land I bought from him, I
" would have procured the deed of Jose and Mariano.
" I sold the land so bought from Innocencio and the per-
" son who purchased from me, took the same title that I
" had."

Victor Castro made affidavit April 16, 1889, that he was born in 1820, and resided in Contra Costa county since 1837, that he was intimately acquainted with the Romero brothers, that in 1844, they claimed a grant from Micheltorena, that it was known to those living near the Romero claim that the brothers had divided the land between themselves, this partition was notorious and it was respected by the neighbors, that he was well acquainted with the tract allotted to Innocencio, that Innocencio had

sold to different people lands within said tract and then sold what was left to the Spaniards in 1853 or 1854, that in the division Jose got the land lying east of Innocencio's, and Mariano's land was south and southeast, that during all the time from the division up to the date of sale to the Spaniards, neither of the brothers nor any other person claimed any title as against Innocencio; that he was in undisturbed possession of the land claimed by him.

These affidavits, while they could not be taken as evidence to change a finding justified by the evidence contained in the record, are cited merely as sustaining a conclusion which I think must be found from that record, viz., that a parol partition of the grant was made by the brothers and that each one was in undisturbed possession of the portion allotted to him, and sold and disposed of said portion.

There appears to be a discrepancy between the testimony of Innocencio Romero and the other witnesses to the partition, on one point, viz., he states that the portion allotted to Mariano was the northeast section of the grant, while the other witnesses establish the fact that the portion allotted to Mariano was the southeast section of the grant.

At the time Innocencio gave his testimony he was seventy years of age, it was thirty years after the partition, the testimony was given in Spanish and was submitted through an interpreter and the record shows that frequent mistakes were made in recording and transcribing the testimony, in view of these facts I do not think said discrepancy in the record should be regarded as casting discredit on the testimony of these witnesses, they agree in their statements in all essential particulars although the evidence was taken at different times and before different tribunals.

On February 14, 1855, Pujol and Sanjurjo conveyed the land in dispute to J. W. Tice. On August 18, 1855, J. W. Tice conveyed the premises to A. J. Tice. On October 17, 1859, A. J. Tice, conveyed to S. P. Millett, and on October 17, 1860, Millett conveyed to J. W. Tice. All of these transfers were based upon a valuable consideration, and the tract conveyed was the same as that delivered by Romero to Pujol and Sanjurjo, and by the latter to J. W. Tice.

On April 6, 1861, J. W. Tice conveyed the premises to Urhetta Tice and thus the title was in her at the date of the passage of the act of July 23, 1866.

It is asserted that the interest conveyed to Pujol and Sanjurjo was an undivided one-third of the lands granted to the Romero brothers, and that it was not a definite tract of land which the parties could possess according to the lines of their original purchase. The evidence is explicit that Romero delivered to his grantees the tract of land which he claimed was allotted to him in the partition, that he went with them and pointed out the lines of their possession, as he states of

" the same land which when my brothers divided was set
" aside as my part and which I have already described to
" you, except some small parcels within the exterior lines
" which I had sold to others before and told Pujol about."

This statement is confirmed by Sybrian who was present when the grantees were put in possession by Romero.

In reply to the question " why did you specify the land
" sold to Pujol as an undivided one-third ? " he answered,

" I did not write it, the grant lines were not fixed, and
" the grant was not divided by a surveyor or by a court,
" after we made the bargain I pointed out to Pujol the
" boundaries of my land and told him to draw a deed for

" the land. The land that I sold them was divided and " well defined. But I sold him a third of the grant, which " would amount to more than what Pujol took possession " of."

The Romero grant was a sobrante or surplus of land after the claim of surrounding grantees had been satisfied, hence at the date of partition it was impossible to tell just where the exterior lines of the grant were located, and for this reason Innocencio testified " that he and his " brothers divided some of the land " between them, but the evidence is clear that the portion divided was possessed and sold according to the lines of said division and I do not deem it necessary at this time to speculate as to how much land Pujol and Sanjurjo would have been entitled to, under their deed had they retained possession, and had the grant been confirmed, and for a greater quantity of land than was divided between the three brothers by boundaries the only question to be determined at this time is, did Romero sell a tract of land definite and specific as to boundaries? In my opinion the answer to this question must be in the affirmative.

The object of the statute under consideration was to afford relief to those who had used, improved, and continued in the actual possession of land purchased from supposed Mexican grantees.

The evidence is clear as to the tract intended to be purchased and the identity of said tract was not destroyed by the terms used in the instrument of transfer, viz., an undivided one-third of lands granted &c. Taylor *v.* Yates (10 L. D., 242). This was the tract conveyed to Tice by Pujol and Sanjurjo, and the title to the same was in Urhetta Tice on July 23, 1866, and was afterwards conveyed to Naphtaly and the evidence shows that all the purchasers from Pujol and Sanjurjo to Naphtaly main-

tained possession of said tract substantially according to the lines of the original purchase. It is asserted, however, that exclusive possession was not maintained by the different purchasers. It appears from the evidence that while a portion of the tract was cultivated, the greater portion was used for grazing purposes, that the tract was enclosed by fences and natural barriers, but that the stock of surrounding claimants would in certain seasons of the year intrude upon this enclosure, and also that the owners at times granted permission for cattle to graze on the land. It does not follow, however, that the claimants did not maintain possession of the tract in dispute and use it for the purpose for which it was best adapted. In the case of Dallas *v.* White (Copp's Land Owner, Vol. 5, p. 82), it was held after citing the case of Hyatt *v.* Smith, that it is sufficient under the act now under consideration, if the lands claimed are used for the purpose for which they are best adapted, without a fence or enclosure.

It is alleged that neither Pujol and Sanjurjol nor any of the subsequent holders purchased in good faith, that each purchased a speculative title.

In my opinion the record does not sustain this conclusion.

The evidence shows that the Romero brothers believed that they had a valid grant, and this opinion and belief was shared generally by their neighbors and associates, and the community. The holders of the title to the lands claimed to have been granted had purchased prior to the rejection of the grant by the supreme court and up to the date of the rejection by the final tribunal, there was at least, reasonable grounds for the belief that the grant would be confirmed. It was rejected both by the lower tribunals and by the supreme court for the reason that there was no record evidence that the grant had actually

issued by the Mexican Governor. There was, howev
parol evidence introduced which taken separately, creat
a strong presumption that the grant had issued.
this connection the court say (1 Wallace, 721) " taken se
" arately the parol evidence if competent, might possib
" justify a different conclusion," but taken in connecti
with the documentary evidence and when so considere
the conclusion was that no grant was issued by the go
ernor. If it required the careful analysis of the eviden
by able lawyers to determine the character of the gra
and the same was rejected for technical defects and n
for fraud or the want of good faith on the part of t
grantee, it is but reasonable to assume that the communi
at large were strong in the belief that the grant was a val
one and that the title purchased was a good one.

Attention is called to the fact that while the consider
tion named in the deed was $5,000, it was agreed a
stipulated between the parties that an additional $3,0
should be paid in the event of the confirmation of t
grant and this is cited in support of the conclusion th
the title purchased was a speculative one. I do not co
cur in this view. The facts as they existed at that tim
must be taken into account. It was well known that t
grant must be confirmed by a judicial tribunal, and th
it was essential that evidence of the grant should be pr
duced before that tribunal and the parties to produce th
evidence were the grantees themselves, and in order th
they might retain their interest in producing such eviden
it was but reasonable that increased consideration for t
property should be agreed upon in the event of the co
firmation of title, but it is not reasonable to assume th
the sum of $5,000 would be paid for a merely speculati
title.

Attention is called to the fact that parol eviden

shows that certain stock, horses, cattle, etc., passed with the land. The evidence, however, fails to show that the value of the stock amounted to any definite sum, nor is the record evidence overcome that a valuable money consideration was paid for the land by the grantees of Romero.

J. W. Tice was a purchaser for a valuable consideration from said grantees and he, on April 6, 1861, conveyed the title to his mother Urhetta Tice, the consideration being love and affection, and her better support, maintenance and protection, and it is contended that while this is a good consideration, it is not a valuable consideration, and hence that at the date of the passage of the act of July 23, 1866, the title was not vested in one who was qualified to purchase under said act.

I think the evidence clearly shows that Urhetta Tice, if the deed to her is to be considered an absolute conveyance, was a purchaser in good faith; that she purchased from the assignee of a Mexican grantee; that the grant was rejected subsequent to the purchase, that she had used and improved the land and continued in actual possession of the same according to the lines of the original purchase and that there was no valid adverse claim to the land except that of the United States. In view, however, of the consideration expressed in the deed, can she be considered a purchaser for a valuable consideration, the additional qualification necessary in order to be a purchaser under the statute?

I have carefully examined the discussion of this act by Congress for the purpose of ascertaining whether or not it was intended that any specific class of considerations should move between the Mexican holder and his transferee, and in the brief argument which arose over the passage of the bill I find no mention thereof, and I very seriously

doubt whether Congress intended any more by this proviso than to prevent fraudulent or speculative transfers, hence it used the term, " valuable consideration," in its popular sense, rather than in its technical meaning and application. However, finding the words " valuable con- " sideration," in the section, the presumption of the law is that Congress used it in its well defined legal signification, hence the department in interpreting the same, must be governed by the definition thereof, as used in the books. Bouvier defines " valuable consideration " as

" One which confers some benefit upon the party by " whom the promise is made, or upon a third party at his " instance or request; or some detriment sustained, at " the instance of the party promising, by the party in " whose favor the promise is made; a valuable consider- " ation may consist either in some right, interest, profit, " or benefit accruing to one party, or some forbearance, " detriment, loss or responsibility given, suffered, or un- " dertaken by the other.

" Good considerations are those of blood, natural love " or affection, and the like. Motives of natural duty, " generosity, and prudence come under this class."

I think it may be laid down as a general rule, that a " good consideration " will pass the title and support the covenants of a deed and will be enforced both in law and in equity, *inter partes*, and in all cases where such conveyance is not to the prejudice of creditors, or in fraud of the rights of others than the parties to the conveyance itself.

The act in question is remedial in its nature and should be liberally construed.

" It has been held in the case of a remedial act that " everything is to be done in advancement of the remedy " that can be given consistently with any construction " that can be put upon it."

The consideration between the son J. W. Tice and the mother Urhetta Tice, for the transfer was good and vested the title in her, unless the inhibition in the statute intervenes to prevent the same.

The record shows that the Tice family, consisting of the father and mother, the two sons, A. J. and James W. Tice, and the daughter, the wife of S. P. Millett, occupied and lived upon and improved the land, and various transfers were made between themselves prior to July 23, 1866, as before recited. By deed dated May 13, 1863, Urhetta Tice, A. J. Tice, S. P. Millett and wife, conveyed the land to D. P. Smith, who, on February 25, 1869, conveyed to John R. Spring, who, on March 24, 1869, conveyed to Martin Clark, and Clark on May 15, 1876, conveyed to Naphtaly. By deed dated April 1, 1869, James W. Tice conveyed the land to Martin Clark. All of these conveyances were for a valuable consideration.

The applicant, Naphtaly, has filed an affidavit in which he states that he was well acquainted with the Tice family, that when the conveyance was made, owing to the insolvency of the father, it was made to the son, James W. Tice, and the legal title was in him, although the other members of the family were interested in the purchase. James W. Tice, it was claimed, mortgaged the land for his own benefit, the other parties interested therefore insisted that the title should be transferred to the mother by a deed of gift, Mrs. Tice, however, holding the title only in trust for the other parties in interest and especially as security for the interest she and her husband had in the ranch. Subsequently, when it was determined to sell the ranch, she agreed to convey, provided the claims against the same were paid, and her claim of $2,000 was satisfied, which claim of $2,000, with interest, Naphtaly subsequently paid.

If the conveyance to Urhetta Tice was simply a deed of trust for the benefit of the other members of the family, and in the nature of a mortgage as security for a claim against the property, a different rule might govern, and it may appear that the equitable title remained in the son, who was a qualified purchaser under the statute.

Whatever evidence there is on this point is outside the record, and is neither conclusive nor satisfactory, and in order that the facts may be ascertained, you are hereby instructed to order a further hearing on this point only.

Give due notice to the parties in interest and when the evidence is received, transmit the same to this Department for consideration, and in the meantime allow no disposal of the land in question.

PRIVATE CLAIM—SECTION 7, ACT OF JULY 23, 1866—RAILROAD GRANT.

NAPHTALY *v.* BREGARD ET AL.

The right of purchase under section 7, act of July 23, 1866, is not defeated by the fact that the legal title to the land in question, at the date of said act, is held by one not a purchaser for a valuable consideration, where the owner of the equitable title at such time is not thus disqualified.

The right of purchase under said section existing at the date when the grant to the railroad company became effective excepts the land covered thereby from the operation of said grant.

Secretary Noble to the Commissioner of the General Land Office, May 18, 1892.

In the decision rendered by this Department in the case of Naphtaly *v.* Bregard *et al.* (12 L. D. 667), it was stated that James W. Tice was a purchaser of the land involved for a valuable consideration, and that he, on April 5, 1861, conveyed the title to his mother Urhetta Tice, the consideration being love and affection, and her better support, maintenance, and protection. It was further held that Urhetta Tice, not being a purchaser for a valuable consideration, was not a qualified purchaser under the seventh section of the act of July 23, 1866, and consequently that Naphtaly, who derived title through her, was not qualified to thus purchase.

It was, however, said that,

"If the conveyance to Urhetta Tice was simply a deed "of trust for the benefit of the other members of the "family, and in the nature of a mortgage as security for

" a claim against the estate, a different rule might govern, " and it may appear that the equitable title remained in " the son, who was a qualified purchaser under the stat- " ute."

It was further stated that by deed dated May 13, 1868, Urhetta Tice, A. J. Tice, S. P. Millett and wife, conveyed the land to D. P. Smith, and that by deed dated April 1, 1869, James W. Tice conveyed the land to Martin Clark.

It thus appeared that seven years subsequent to the date of an instrument which purported to convey an estate in fee to Urhetta Tice, she, together with all the heirs except J. W. Tice, her grantor, conveyed by deed, and that eight years after said purported conveyance in fee to Urhetta Tice, her grantor conveyed the same premises by deed absolute to another party. These facts could not fail to excite comment, and to raise a doubt as to whether the estate held by Urhetta Tice was an estate in fee, or a conditional estate. It was largely in view of these facts, supported by the statement of Naphtaly, that " Mrs. Tice was holding the title only in trust for the other " parties in interest and especially as security for the in- " terest she and her husband had in the ranch," that it was deemed necessary that a further hearing be ordered, in order to ascertain, if possible, the real facts in the case, that justice to all parties might be done.

This recital is made for the purpose of showing that the contention of counsel for Bregard *et al.* that " the hear- " ing was granted on the uncorroborated affidavit of the " claimant himself, an affidavit not even based on his own " knowledge, but on mere hearsay, of the most indefinite " and uncertain character," is in no way sustained by the record.

At the rehearing all parties were fully represented by counsel and evidence, both record and parol, was intro-

duced. That evidence is now before me for consideration.

The first question to be determined is this: Was the deed given by James W. Tice, dated April 5, 1861, to his mother Urhetta Tice, and acknowledged October 21, 1863, an absolute conveyance in fee, or was it in the nature of a deed of trust for the benefit of the other members of the family, and in the nature of a mortgage as security for a claim against the property?

On its face the deed was an absolute conveyance of the premises in controversy.

In the case of Russell *v.* Southard (12 Howard, 139), the court, in inquiry as to whether a conveyance was a sale or mortgage, took into consideration the condition and relation of parties, the amount of consideration, etc., and held that, "Parol proof is admissible to show a deed "absolute on its face to have been intended as a mort-"gage."

In the case of Hughes *v.* Edwards (9 Wheaton, 489), the court say:

"A court of equity looks at the real object and inten-"tion of the conveyances; and when the grantor applies "to redeem, upon an allegation that the deed was intended "as a security for a debt, that court treats it precisely as "it would an ordinary mortgage, provided the truth of the "allegation is made out by the evidence."

In the case of Henly *v.* Hotaling (41 Cal. 22), the court say:

"When the intention of the parties to a deed, absolute "in form, is sought to be ascertained, not in the usual "way, by reading and construing the instrument, in con-"nection with evidence to identify the subject matter, the "parties, etc., but by evidence to establish an equity be-

" yond and outside of the deed, and thus to convert the " deed into a mortgage, the evidence ought to be so clear " as to leave no doubt that the real intention of the par- " ties was to execute a mortgage, otherwise the intention " appearing on the face of the deed ought to prevail."

With these rules for our guidance, the evidence submitted must be examined with a view to ascertain, if possible, the real object and intentions of the conveyance by J. W. Tice to Urhetta Tice, dated April 5, 1861.

The records show that on December 26, 1862, nearly two years subsequent to the deed of gift, J. W. Tice executed a mortgage of the premises in question to secure the payment of a note for $1,500, given by him and his father, James M. Tice.

On December 20, 1861, several months subsequent to the deed of gift, J. W. Tice by James M. Tice, his attorney in fact, entered into a contract with J. B. Crockett, an attorney at law, by which he agreed to convey to said Crockett, with covenants only against the acts of said grantor, for services rendered by said Crockett, an undivided one-eighth interest in the premises in controversy, with the exception of certain specified tracts.

James M. Tice, the attorney in fact, was the husband of Urhetta Tice.

The only explanation that can be given of his action is, that he considered the equitable title, at least, to be in J. W. Tice, and did not recognize the deed of gift as divesting him (J. W. Tice) of the title to the land.

It will be observed that these instruments were executed prior to the date of acknowledgment of the deed of gift, and of recording the same, and in my opinion they clearly indicate what was in the mind of the grantor; they indicate that he regarded himself as the owner of said premises, that the title was in him.

The conveyance, dated April 5, 1861, was not recorded until April 1, 1867. On said deed is the endorsement that it is recorded at the request of Urhetta Tice. At the trial of this case D. P. Smith testified that the grantor J. W. Tice had the deed recorded. However this may be, under date of April 25, 1867, J. W. Tice gave to Lloyd Tevis a mortgage of the premises in question as security for the payment of $4400 borrowed money; and on April 1, 1869, said J. W. Tice gave to Martin Clark a deed absolute for the premises in controversy.

The conveyance would certainly indicate that J. W. Tice considered that he had title to the land, which had not been divested by the deed of April 5, 1861, to his mother.

In what light did the grantee, Urhetta Tice consider this transfer?

On April 30, 1868, she entered into a contract with D. P. Smith to convey to him all the lands described in the above-mentioned deed of April 5, 1861. In this contract she agrees,

"that she will procure and deliver to said party of the "second part a deed to him from Andrew J. Tice, James "W. Tice, S. P. Millett, and Pauline V. Millett his wife, "of all their right, title and interest of every kind legal "and equitable, of, in and to all the land or lands here-"inbefore described."

The consideration for this contract was $2000 to be paid to Urhetta Tice, and in addition to said sum, Smith agreed to pay the $4400 borrowed by J. W. Tice, from Lloyd Tevis, to secure the payment of which said Tice had executed a mortgage of the premises in question to Tevis, on April 25, 1867. On May 13, 1868, Urhetta Tice, Andrew J. Tice, S. P. Millett and Pauline V. Millett, executed a

deed conveying the premises to D. P. Smith, consideration $7000. In the body of the deed the name of James W. Tice appears as one of the grantors, but he did not sign the deed.

It is not reasonable to suppose that had Urhetta Tice believed that the fee to the land in question was in her by virtue of the deed of April 5, 1861, and that she had the right to convey the same, that she would have agreed to procure deeds from other members of the family, neither is it reasonable to suppose that the various grantees would have united in a conveyance had they not considered that they had some rights to convey. The consideration, $7000 in round numbers, was the $4400 borrowed by J. W. Tice, and which Smith agreed to pay, and the $2000 which appears to have been the interest of Mrs. Tice, the mother, in the property.

Thus the evidence would indicate that neither the grantor nor the grantee, nor the other members of the family, considered the deed of gift, a deed absolute.

Is there anything in the record to indicate in what light the deed in question *should* be regarded?

The Tice family, consisting of father, mother, two sons, a daughter and son-in-law, occupied the property in common; it was their home and the ranch was carried on by them.

There is nothing to indicate that it was the intention of the various members of the family to surrender to the mother, or to transfer to her, all their property interest in this home, and which appears to have been the common property of them all.

The only member of the family who testified at the rehearing, was the daughter, formerly the wife of S. P. Millett, and who, with her husband, was an occupant of the ranch, before and at the time, and subsequent to the

conveyance dated April 5, 1861. She testified that the deed "was made to mother to secure us all."

"Q. What do you mean by 'secure us all'?
"A. Because we were all interested in it, my brother "was getting reckless and we wanted the property out of "his hands."

She further testified that her father could not take the deed in his own name on account of his indebtedness.

She was asked "whether the two thousand dollars to be "paid to your mother, Urhetta Tice, upon making the "deed by her and other members of the family, was paid "to her?"

The deed in question was the one dated May 13, 1868, before mentioned. She testified that $1500 was paid her at the ranch, and the balance in the city of San Francisco.

She also testified that after the death of her husband she (the witness) received the portion due her, as her interest in the ranch, also that J. W. Tice received the amount due for his interest in the property, and by reference to the deed of May 13, 1868, it will be seen that there was expressly reserved from the property transferred, the one hundred and sixty acres occupied by A. J. Tice, the other son; this was presumably a portion, at least, of his interst in the estate.

This evidence is clear and explicit and in connection with the other, throws much light upon the financial transactions of the Tice family, and the relations they held to one another financially. It shows that the deed of gift was not only for the protection of the mother of her interest, but was for the protection of the other members of the family.

Lloyd Tevis, who had taken the mortgage from J. W.

Tice to secure the payment of the $4400 borrowed, testified that when he discovered that the deed of gift had been placed on record just prior to the execution of the mortgage held by him, he had an interview with Mrs. Tice and made inquiry concerning said deed, and Mrs. Tice told him that "the deed was only intended to secure her for "the payment of two thousand dollars."

The contract dated April 30, 1868, and the deed dated May 13, 1868, is certainly strong corroborative evidence of the truth of this statement.

Moses G. Cobb, a lawyer who was employed to bring the foreclosure suit in 1868 on the mortgage given by Tice to Tevis in 1867, testified that J. W. Tice the grantor and Urhetta Tice the grantee in the deed of gift, both told him that the deed was given simply by way of security, and that for a limited amount, he thinks about $2000.

James W. Tice, the grantor in the deed of April 5, 1861, and the one, who above all others, could have given evidence as to the true intent of said conveyance, is dead. The grantee, Urhetta Tice, though living, refused to appear at the trial, or to give her evidence by deposition, although both parties swear that they endeavored to have her appear and testify.

The evidence shows that on June 28, 1891, five days subsequent to the departmental decision ordering a further hearing in the case, three men, acting in the interest of Naphtaly, had an interview with Mrs. Tice at her home near San Francisco, and in conversation with her in relation to the character of the deed dated April 5, 1861, she made and subscribed to the following statement:

"That at the time of my receiving from my son James "William, a deed to the Tice ranch, that there was due "and owing to me the sum of $2500, and the reason of

" the giving to me said deed was to secure me from any " loss as to said $2500."

It is shown that this statement in substance was made in the absence of undue influence. After the evidence in relation to this statement was submitted at the hearing, Urhetta Tice, after an interview with Josiah S. Smith, one of the contestants, made the following affidavit:

" I, Urhetta Tice, being duly sworn, depose and say, " that I am the same Urhetta Tice named in a certain " deed made by my son, James W. Tice, on the 5th day " of April, 1861, for love and affection and better main- " tenance and support; that said deed was not made to " secure the payment of $2500, or any other sum of money " due me from my son James, nor was my said son in- " debted to me when said deed was made, but said deed " was made for my sole use and benefit, and the same was " intended to be and was an absolute conveyance to me " of the property, and was made for the express purpose " of securing me a home, and not otherwise."

This was purely an *ex parte* affidavit taken without notice to the opposite party and with no opportunity for cross-examination. Objection was made to its introduction, and it cannot be taken as evidence; but even if it could be received, it simply demonstrates that the party will, either with or without a full understanding of the import of her words, make statements directly at variance with each other on the same subject, under different circumstance, and her evidence is of little or no value, on either side.

The only parties who appeared as witnesses for the contestants, were D. P. Smith and Josiah S. Smith both claimants adverse to Naphtaly.

An attempt is made to throw discredit upon the testimony of Mrs. Remington, formerly Mrs. Millett, the daugh-

ter, by asserting that she had made statements different from those made under oath. Thus, on December 15, 1891, Josiah S. Smith testified that on the day before he had an interview with Mrs. Remington who said to him, referring to the deed of April 5, 1861, that said "deed was given from her brother to her mother for a home for her mother and the children." On the same day D. P. Smith testified that on the day before he had an interview with the witness, who said referring to the deed of April 5, 1861, that "it was deeded to the old lady to keep the "boys from spending the money during her life time." I think it is evident from these varying statements, that these witnesses give their interpretation of what Mrs. Remington said, rather than what she actually did say, and their testimony did not impeach her clear and positive evidence.

D. P. Smith testifies that he was the agent who attended to the business of Mr. Tevis in his transaction with the Tices when the $4,400 was borrowed, that he was interested in having the agreement of April 30, 1868, perfected, that he visited Mrs. Tice in company with Tevis and he states that in that interview nothing was said about the deed of April 5, 1861, "being intended to secure a loan "of $2,000 from James W. Tice to his mother," further on he states that at that interview nothing was said about said deed being intended simply as a security for a loan of $2,000, or any other amount. When this evidence is analyzed in connection with the other evidence in the case, it will be found that it does not amount to a contradiction of the evidence submitted by Naphtaly. No where in the record is there any evidence that the deed of April 5, 1861, was made as a security for a loan, no where is there any attempt made to show that the mother had loaned money to the son, and had taken this deed as security.

The evidence of John A. White throws much light upon this transaction.

The deed from Pujol and Sanjurjo to James W. Tice was made February 14, 1855. Mr. White testifies that in the spring of 1855 he was a partner of James M. Tice (the father) under the firm of Tice and White, that the firm purchased the interest in the Romero ranch. His testimony is as follows:

"When we purchased that place, it was purchased for "James Tice and myself. The consideration was from "$3,000 to $3,500. We gave our note for that amount, "and took possession of the place. But the deed was "first made to J. M. Tice and White, then his family came "out here; then J. W. Tice came out here about that "time. Then J. M. Tice and myself had some business "trouble, and I said to him: 'I prefer to give it to your "'son J. W. Tice, and give me my note.' We took our "note up and let Sanjurjo take James W's note. I told "him it was better for them to take up our note, and take "J. W. T's and have our note made to him. My name "was crossed out of the old deed and it was transferred "to James W. Tice, and it was afterwards paid. That "was the way it was done, and James W. Tice took pos-"session of the ranch. It was paid out of some property "that originally belonged to Mr. James M. and myself. "I told him he could have the ranch. After getting back "the note I told him he could have the ranch, and I would "have nothing to do with it."

Thus the original payment is accounted for; it was made with the property of the father, James M. Tice. This was in 1855, and from that time until April 5, 1861, not only had the father labored to increase the value of the property, but the two sons, the son-in-law and the daughter had united their efforts to promote the same end. Owing to the action of the member of the family in whom the

title was vested, the other members including the father, who had paid the original purchase money, but who could not, on account of financial trouble hold the title in his name, desired security for their interests, and this was given by means of the deed in question absolute on its face, for a good, but not for a valuable consideration.

This deed was given for the security of an interest in the estate, or in other words, a debt against the estate, and this interest in the estate had been obtained, and the debt against the estate incurred, by means of the payment of money and by means of labor extended.

In the case of New Orleans Banking Association *v.* Adams (109 U. S., 211), the court say:

"While it may be conceded that no precise form of "words is necessary to constitute a mortgage, yet there "must be a present purpose of the mortgagor to pledge "his land for the payment of a sum of money, or the per- "formance of some other act, or it can not be construed "to be a mortgage."

Applying this rule to the facts in the case at bar, there can be no doubt that it was the intention of James W. Tice, by the deed of gift to pledge the estate to secure the interests of all parties entitled to protection.

In the case of Peugh *v.* Davis (96 U. S., 332), the court say:

"It is an established doctrine that a court of equity will "treat a deed, absolute in form, as a mortgage, when it "is executed as security for a loan of money. That court "looks beyond the terms of the instrument to the real "transaction, and when that is shown to be one of se- "curity and not of sale, it will give effect to the actual "contract of the parties. As the equity, upon which the "court acts in such cases, arises from the real character "of the transaction, any evidence, written or oral, tend-

" ing to show this is admissible. The rule which excludes " parol testimony to contradict or vary a written instru- " ment has reference to the language used by the parties. " That can not be qualified or varied from its natural im- " port, but must speak for itself. The rule does not " forbid an inquiry into the object of the parties in exe- " cuting and receiving the instrument. Thus, it may be " shown that a deed was made to defraud creditors, or to " give a preference, or to secure a loan, or for any other " object not apparent on its face. The object of parties " in such cases will be considered by a court of equity; " it constitutes a ground for the exercise of its jurisdic- " tion, which will always be asserted to prevent fraud or " oppression, and to promote justice."

The object of the deed dated April 5, 1861, between J. W. Tice and Urhetta Tice being shown, it is the duty of the Department to give it such an interpretation as will carry out the intention of the parties, and promote justice.

If the question of the right of the grantees of both Urhetta Tice and J. W. Tice, was entirely eliminated, and the question was resolved to that of the rights of Urhetta Tice and the other members of the family in reality the joint owners of the estate under the deed in question, there can be no doubt but that a court of equity would decree the instrument to be a mortgage for the security for the payment of each interest, and not a deed absolute, which would deprive the various ones interested of their rights, as to thus hold would be to work oppression and injustice.

In view of all the evidence in the case, and in view of the rule of law pointing out the construction to be given to conveyances, I am of the opinion, that the deed of April 5, 1861, must be held to have been a conveyance, in the nature of a mortgage, given for the security of claims against the estate, and that on July 23, 1866, the equitable title to the land in controversy, was in James

W. Tice and was by him on April 1, 1869, conveyed to Clark, and that Naphtaly is a qualified purchaser under the 7th section of the act of July 23, 1866.

In the decision of this case, by the local officers, certain tracts applied for by Naphtaly were awarded to the Western Pacific Railroad Company. In the decision by your office the question of the right of the company was left to future adjudication, and in the Departmental decision of February 4, 1889 (L. D., 144), no disposition of the claim was made.

The company claims under the third section of the act of July 1, 1862 (12 Stat., 489), which granted to it the alternate sections, designated by odd numbers, within ten miles of each side of the road, "not sold, reserved or "otherwise disposed of by the United States, and to "which a pre-emption or homestead claim may not have "attached at the time the line of said road is definitely "fixed." The road was definitely located opposite the land in controversy subsequent to the date of the passage of the act of July 23, 1866, under which Naphtaly claims, thus at the time the grant took effect by the definite location of the road, the land was occupied and in the possession of one entitled to purchase under the act of July 23, 1886, and this legal right, which was founded upon an equity which existed long prior to the date of the granting act, reserved the land from the operation of said grant.

This principle is in accordance with the ruling of the Department in the case of the Northern Pacific Railroad Company *v.* Killian (11 L. D., 596), and cases cited therein.

Departmental decision of February 4, 1889, is herewith recalled, and you will dispose of the case in accordance with the views expressed in my decision of June 23, 1891, and in this decision.

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOSIAH SMITH,
APPELLANT,
v.
JOSEPH NAPHTALY.

No. 181.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLEE.

STATEMENT.

The amended complaint of appellant avers that he is the equitable owner and entitled to the exclusive possession of 160 acres in controversy, viz., N.E. ¼ Sec. 10, Tp. 1 S., R. 2 W., M. D. M., California.

That his right, title and interest arises because, being a qualified party, he settled in person in 1875 upon said land, then unsurveyed, built a dwelling in which his family have since resided, planted an orchard, cultivated the ground

and enclosed the land, his improvements being of the value of two thousand dollars; that about August, 1878, the land being then surveyed, he made his pre-emption filing in the proper U. S. Land Office; that at all times since he has been ready, anxious, and willing, and has at divers times at said land office offered and demanded, to make proof of his right to purchase said land, but has at all times been hindered and prevented by the adverse and groundless claim of defendant, as follows:

That defendant, on August 10, 1883, filed at the San Francisco Land Office his application to purchase said tract by virtue of the preference right conferred by Section 7 of the Act of Congress approved July 23, 1866, 14th Stat., p. 220, which right of purchase was based upon the assumption that, in 1844, Innocencio, José, and Mariano Romero obtained from the Mexican Government a grant of land; that about three thousand acres thereof, including the land in controversy, was subsequently partitioned to said Innocencio, and that about May 15, 1876, the defendant Naphtaly became, by mesne conveyances, a purchaser of said three-thousand-acre tract; that Secretary of the Interior Vilas rendered a decision rejecting his application to purchase, but that upon review Secretary Noble allowed the application, and Naphtaly was thereupon permitted to make payment and to receive patents for the lands in question; but that inasmuch as the Supreme Court of the United States had "found, held, and decided that no grant or "semblance of a grant had ever been made to the Romeros, "or any of them, for said land, or any part thereof, and on "that ground alone the said claim was rejected" (Rec., p. 3), and inasmuch as Secretary Noble had no authority to review the decision of his predecessor (p. 4), and inasmuch as Naphtaly purchased after rejection of title by United States Supreme Court, and with knowledge thereof (p. 4), *therefore*

the patents to Naphtaly were issued without authority of law and are wholly void.

The prayer of the bill was for a decree adjudging the sale to Naphtaly to be without authority of law and void; that the patent issued to him is of no legal force or effect; that Naphtaly has no estate, right, or title in the land adverse to the plaintaiff, and that he be forever enjoined and restrained from setting up or asserting any right or claim thereto adverse to the plaintiff.

The United States Circuit Court sustained demurrer and dismissed the bill. This decree was affirmed upon appeal by the United States Circuit Court of Appeals for the Ninth Circuit, from which affirmance the case comes here.

ARGUMENT.

I.

No fraud or imposition being alleged, appellant is upon the face of his bill a naked trespasser and has no standing in Court. He sets up the application of Naphtaly to purchase the lands in controversy and pursuant to the 7th section of the Act of July 23, 1866, which section required proof that applicant had purchased said lands in good faith and for a valuable consideration from a Mexican grantee or his assigns; that the alleged grant had been subsequently rejected, and that the applicant had used, improved, and continued in the actual possession of the same, according to the lines of his original purchase. Proof of the use, improvement, and continuous actual possession of the lands applied for lay at the very foundation of Naphtaly's petition to the Land Department, and it appears upon the face of appellant's bill that a full hearing and investigation of all matters alleged in the petition, including

the claim as to use, improvement, and possession, was had before the proper officers of the Land Department. It follows from the allowance of Naphtaly's application and the issue of patent to him that the decision of the officers of the Land Department was in his favor upon those questions of use, improvement, and continuous possession by himself and his grantees; and that the claim thus allowed related back to the date of the Act of July 23, 1866, unaffected by subsequent unlawful disturbance. (*Watrous* v. *Reed*, 99 *Cal.* 134.)

Inasmuch as there is no allegation of fraud, imposition, false testimony, or other unlawful means used by Naphtaly to procure the decision of the Land Department in his favor, and as his right of purchase takes effect by relation as of the date of the Act of July 23, 1866, it necessarily follows that the appellant is a naked trespasser, and that his intrusion upon the land in 1875 was unlawful and totally void. Upon the face of his bill he is clearly within the repeated ruling of this Court that, as against existing occupants, a settlement upon public lands already occupied is a naked, unlawful trespass and cannot initiate a right of pre-emption.

Atherton v. *Fowler*, 96 *U. S.* 513;
Hosmer v. *Wallace*, 97 *U. S.* 580; and
Quinby v. *Conlan*, 104 *U. S.* 423.

II.

In affirming the application of Naphtaly under Section 7, Act July 23, 1866, the land being public land and subject to sale, the Land Department acted wholly within its jurisdiction, and, upon the pleadings in this case, its findings are not reviewable by the courts. The Secretary of the Interior was authorized by the statute to determine

whether upon the proofs the necessary facts were satisfactorily established to bring the application of Naphtaly within the requirements of the law. Under whatever form of words appellant seeks to disguise his purpose, the averments of his bill clearly present only an attempted traverse of the conclusions of the Land Department upon the testimony before it. Under the 7th section, Act July 23, 1866, the Land Department was authorized to recognize a preference right of purchase by parties, who established to *its* satisfaction the following facts, viz:

1st. That the applicant purchased the lands from a Mexican grantee or his assigns.

2d. That he purchased the lands in good faith and for a valuable consideration.

3d. That the grant had "subsequently been rejected" or the lands purchased had been "excluded from the final "survey."

4th. That the purchasers had "used, improved, and con- "tinued in the actual possession of the same according to "the lines of their original purchase."

5th. That no valid adverse right or title (except of the United States) existed thereto.

6th. That the lands did not contain mines of gold, silver, cinnabar, or copper.

These were all matters of proof. They were facts to be established to the satisfaction of the Land Department. "Upon first making proof of the facts as required in this "section under regulations to be provided by the Commis- "sioner of the General Land Office" is the language of the statute under consideration. When, then, the proper officers of the Land Department have determined these matters of fact and patent has issued pursuant to such decision, the courts will not interfere with that title upon an averment that the officers were mistaken in their view of

the facts, or erred in their judgment upon the weight of evidence before them. The sufficiency of the facts was within the exclusive jurisdiction of the Land Department, and its determination thereof is conclusive.

As was said by the Court in *Lee v. Johnson*, 116 U. S. p. 49:

"The Court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which these officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the Department."

Johnson v. *Towsley*, 13 Wall. 72.
Shepley v. *Cowan*, 91 U. S. 330, 340.
Moore v. *Robbins*, 96 U. S. 530, 535.
Marquez v. *Frisbie*, 101 U. S. 473, 474.
Quinby v. *Conlan*, 104 U. S. 420, 426.
Smelting Co. v. *Kemp*, 104 U. S. 636, 640.
Steel v. *Refining Co.*, 106 U. S. 447, 450.
Baldwin v. *Starch*, 107 U. S. 463, 465.
Bardon v. *Railroad Co.*, 154 U. S. 288.
Vance v. *Burbank*, 101 U. S. 514.
Hoofnagle v. *Anderson*, 7 Wheat. 212.
Ehrhard v. *Hogaboom*, 115 U. S. 67.
New Dunderberg Mfg. Co. v. *Old*, 79 Fed. Rep. 598, 603.

III.

If, however, the Court believes that upon the face of his bill appellant avers such equities as would control the legal title in the patentee's hands, it then becomes necessary to inquire whether the officers of the Land Department in issuing patent to Naphtaly mistook the law applicable to the record facts, or misunderstood the statute, so

that the title, which ought to have gone to Smith, has been erroneously issued to Naphtaly.

Appellant advances four propositions to establish such misconstruction of law:

1st. That one Secretary of the Interior has no power to grant a rehearing of a case decided by his predecessor; and thereupon, as the claim of Naphtaly was denied by Secretary Vilas, the subsequent reconsideration and allowance thereof by Secretary Noble was without authority of law, and void.

2nd. That as the preference right to purchase provided for in Section 7, Act of July 23, 1866, was extended to purchasers, &c., from "Mexican *grantees*, or assigns, which "*grants* have subsequently been rejected," and as the Romero claim was rejected because there was no *grant*, therefore the Land Department was without authority to permit a purchase of *that* land under the Act of 1866.

3rd. That even if a right of purchase ever existed in any one, Naphtaly was not a purchaser in good faith, he having bought after final rejection of the Romero claim of title.

4th. That the Naphtaly patent is void, because whilst his right of entry accrued under the Act of July 23, 1866, the patent erroneously recites its issuance under the Act of April 24, 1820.

A.

Power of the Secretary to Reconsider.

The Secretary of the Interior is authorized to prescribe Rules of Practice for the conduct of business in the Land Department, and the legal effect of such regulations has been uniformly recognized. The rule governing motions for review of decisions of the Secretary of the Interior, which was in force at date of the decision of Secretary

Vilas of February 4, 1899, and which was approved by Secretary Vilas himself, under date of June 14, 1888, was as follows (see printed Rules of Practice, approved August 13, 1885):

"Rule 114. Motions for review before the Secretary of "the Interior, and applications under Rules 83 and 84, "shall be filed with the Commissioner of the Land Office, "who will thereupon suspend action under the decision "sought to be reviewed and forward to the Secretary said "motion or application."

The record does not challenge the regularity of the motion for review in pending case, and same may therefore be assumed. To show, however, the exact sequence of dates, we print for convenient reference, in appendix to our brief in 180, copy of the motion for review, of the letter filing same, and of the proof of service. Mr. Vilas went out of office March 4, 1889. His decision in the Naphtaly case was dated February 4, 1889 (Rec., p. 10), and the motion for review was filed on March 1, 1889. The review was thus prayed for during the incumbency of the *same* Secretary who rendered the decision.

No question has been made as to the power of a Secretary to review his own decision. The contention of plaintiff in error has been that a succeeding Secretary could not review the decision of his predecessor. Inasmuch, then, as jurisdiction to review attached during the official term of Secretary Vilas, it must have continued after his retirement until decision of his successor unless the jurisdiction to review was purely personal to the temporary incumbent of the office. We need scarcely answer that contention.

The rule is, however, well established that where title has passed out of the United States, so that the jurisdiction of the Executive Department has ended, there is no authority

to review. That is the doctrine of *Noble* v. *Logging Co.*, 147 U. S., and of *U. S.* v. *Stone*, 2 Wall. 537, relied upon by plaintiffs in error. In such cases no succeeding Secretary could lawfully review the executed decision of his predecessor. Neither could the same Secretary have done so under like conditions. But no such rule prevails where the matter is still within the jurisdiction of the Department. A decision being unexecuted, the matter is *in fieri* and is subject to such further action as the officer who is called upon to act may determine to be proper and lawful. The power of review where the *rem* is still within the jurisdiction of the Secretary has been uniformly exercised in the Land Department, and the principle underlying such exercise of revisionary authority was clearly stated by this Court in *Williams* v. *U. S.*, 138, U. S. 524.

"It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervisory power which will enable him, in the face of these unexpected contingencies, to do justice."

So also in *Knight* v. *Land Association*, 142 U. S. 178:

"For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be

" consummated which it would be immediately his duty to
" ask the Attorney-General to take measures to annul."

And the point raised by plaintiffs in error was distinctly ruled upon in *New Orleans* v. *Paine*, 147 U. S. 266 :

" Until the matter is closed by final action, the proceed-
" ings of an officer of the Department are as much open to
" review or reversal by himself, *or his successor*, as are the
" interlocutory decrees of a Court open to review upon the
" final hearing."

And the Court at present term—in *Michigan Land & Lumber Co.* v. *Rust*, *No.* 57—has settled the question beyond the need for further discussion by distinctly holding executive jurisdiction continuing until legal title has vested when the Courts thereafter take jurisdiction.

B.

Want of authority to sell lands to purchasers, etc., where grant was rejected upon the ground that no grant was ever issued by Mexico.

The contention of plaintiff in error is that the preference right of purchase extended by Section 7, Act of July 23, 1866, has no application where no grant had been made by Mexico. The argument in brief is that, there having been no grant, there could be no rejection of a grant, and hence there could be no Mexican grantee from whom to purchase.

This contention is narrow, technical, and unsound. It is a mere play upon words, which defeats the remedial purpose of the statute. Congress had in 1851 provided for the adjudication of these grant claims; and pending their final settlement had reserved all lands within their claimed

limits from the operation of the public land system. (See *Newhall* v. *Sanger*, 92 U. S. 761). Many years were occupied in this inquiry, during which the extent, whether of title or location, to which these claims would be finally located, was purely a matter of legal opinion. In the meantime, California was being rapidly settled. The most valuable agricultural lands were naturally included within these Mexican grant claims, and were the object of the most speedy sales and transfers. They could not be purchased under the public land laws, having been reserved therefrom, until final judicial rejection, and the apparent ownership of the grant claimants to all lands within their claimed limits was fully recognized and protected by the courts, both State and Federal (*Van Reynegan* v. *Bolton*, 95 U. S. 33). These lands, so claimed, were legally sold, and the tracts so purchased were extensively improved and resold over and over again. After all this had occurred during the lapse of many years, the examination under authority of Congress resulted in some cases in rejecting the entire claim, in other instances in confirming it in part, and in others in confirming it as an entirety. In the case of a wholly rejected grant, all these Mexican grant claimants and their assigns were left absolutely without title. In partially confirmed grants, the segregation, like a blanket, could only cover a given area, and when pulled over one set of derivative claimants it was necessarily pulled off another set. In confirmation as an entirety it often happened that the survey did not locate the boundaries as they had been theretofore claimed, and thus excluded occupants under the grant claim of title. In one way and another, many derivative claimants were thus left in actual possession, but without title. They had paid large sums for their lands and had put upon them valuable improvements. They were, too, the only persons whose right of

possession had been recognized and protected by the courts. The equities of these parties appealed strongly to Congress, and at first received recognition in a series of special acts, which finally led up to the general provisions of the 7th section of the Act July 23, 1866. No less than seven of such special laws were thus enacted prior to said general law (Soscol Ranche Act, March 3, 1863, 12 Stats., p. 808; Rancho Bolsa de Tomales, 13 Stat., p. 136; Rancho Laguna de los Santos Calle, 13 Stat., p. 372; Ex-Mission San Jose, 13 Stat., p. 534; City and County of San Francisco, 14 Stat., p. 4; Rancho los Prietos y Najalayegua, 14 Stat., p. 589; Towns of Benina and Santa Cruz, 14 Stat., p. 209), until Congress finally covered the cases of all like purchasers or their assigns in similar possession under the general preference right of purchase enacted in Section 7, Act of July 23, 1866. Congress did not therein undertake to validate defunct titles. No donation was made. Congress simply determined by this legislation that a citizen who had in good faith bought from these Mexican claimants and occupied the lands purchased, and whose possession under color of title had been recognized and protected, but whose claim of title had failed, should have a right to purchase those lands in preference to a party who had no recognized right of possession, and who had neither purchase money nor improvement at stake. The principle of the statute was not the ownership of a legal title, but rather the protection of an equity; and the required qualifications were a purchase from one claiming to have been a Mexican grantee, and possession under such claim of title according to the lines of purchase, but to which the claim of title had failed;—failed for either of the only two possible reasons, viz., that the title had been rejected, or that the lands had been surveyed out. The inquiry under the obvious purpose of the law is, Did the

claimant of the preference right of purchase from the United States buy these lands from a grantor whom they believed to have been a grantee of the Mexican Government, and if so, has he improved and had possession of the lands so purchased? The principle was clearly stated by the Supreme Coure of California in *Buscomb* v. *Davis*, 56 Cal. 152, wherein it was said:

"If we should hold that a 'Mexican grantee' means a "person to whom a grant has been made by the Mexican "Government, it is quite clear that Galindo would not be "within that description; but that construction of the act "would render it superfluous, and Mexican grantees or their "assigns would not require any such aid. The Act there- "fore must have been passed for the benefit of others than "those who had purchased lands of grantees of the Mexi- "can Government. We believe that it was passed for the "benefit of those who, in good faith and for a valuable "consideration, had purchased the lands, which were *sup-* "*posed* to have been granted by the Mexican Government, "and who had used, improved, and continued in the actual "possession thereof as provided in the Act.

"It seems to us that the good faith of the purchaser, his "payment of a valuable consideration, and his occupation "and improvement of the land were the considerations "which moved Congress to pass this Act; and, if so, the "case of this defendant is fairly within the spirit of the "law. In the absence of any valid or adverse right or title, "or *bona-fide* pre-emption claim, there does not seem to be "anything inequitable in the United States preferring as a "purchaser one who has once paid for the land, under the "honest but erroneous impression that he was acquiring a "valid title, to the one who had never purchased or occu- "pied it. We are, therefore, of the opinion that the de- "fendant was a purchaser within the meaning of the Act of "Congress above referred to."

The principle of construction, for which we contend was squarely ruled upon by this honorable Court in *Winona*

and St. Peter R.R. Co. v. *Barney*, 113 U. S. 626. Congress had granted certain lands to the Territory of Minnesota for railroad purposes, and had further provided indemnity for specified losses in the lands "granted as aforesaid." Under the same technical construction of the word "granted" that is asserted here by plaintiffs in error, it was contended that the Government did not own lands sold by it before date of the grant, and as it could not grant what it did not own, indemnity was not due under the words "granted as aforesaid." But this Court, in deciding that the indemnity covered losses both before and after date of the grant, disposed of the above contention by saying:

"It is of no purpose to say against this construction that "the Government could not grant what it did not own, and "therefore could not have intended that its language should "apply to lands which it had disposed of. As already said, "the whole Act must be read to reach the intention of the "law-maker. It used, indeed, words of grant which pur-"port to convey what the grantor owns, and of course can-"not operate upon lands with which the grantor had parted; "and *therefore when it afterwards provides for indemnity* "*for lost portions of the lands 'granted as aforesaid' it* "*means of the lands purporting to be covered by those* "*terms.*"

By analogous reasoning Section 7, here in question, in saying "which grants have subsequently been rejected, or "where the lands so purchased have been excluded from "the final survey of any Mexican grant" should obviously be read as "which purported grants" or which "claims of "grants." This follows necessarily, because the evil intended to be remedied was a bona-fide purchase and continued possession culminating in a *total failure of title.*

C.

That Naphtaly was not a Purchaser in Good Faith, he Having Bought After Final Rejection of the Romero Title.

The Romeros, on January 18, 1844, solicited a grant from the Mexican Governor. Upon their petition was a marginal decree directing the Secretary to report upon the subject, "having first taken such steps as he may deem nec- "essary." There was also a certificate of the Secretary that the Governor directs the first Alcalde of San Jose to summon the colindantes and report upon their allegations; a report of the Alcalde that the colindantes, having been duly summoned, made no objection to the grant, but that another party had claimed the same tract several years before; a report from the Secretary that there was no obstacle to making the grant; a decree directing measurement of the land by the proper judge, and that he "certify the re- "sult so that it may be granted to the petitioners;" a second petition of the Romeros stating failure of judge to make measurement and asking provisional grant; report of Secretary that survey should first be effected, and decree of Governor, viz., "Let everything be done agreeably to the "foregoing report."

In *Romero* v. *United States*, 68 U. S. 740, the United States Supreme Court decided that these documents were not sufficient evidence to establish a grant or concession from Mexico, and finally rejected the claim. This was in December, 1863. But in January, 1844, the Romeros went into possession of the lands then petitioned for, and in 1846 or 1847 the tract here in controversy was partitioned to Innocencio Romero. Said Innocencio in turn sold and conveyed for value, on December 26, 1853, to Domingo Pujol

and Francisco Sanjurjo, and through subsequent mesne conveyances the same tract passed to S. P. Millett, August 5, 1859, who continued in the actual possession and cultivation thereof according to the lines of the original purchase at the time of the passage of the Act of July 23, 1866, and long subsequent thereto. Thereafter the title passed for value through various parties, and with continued use and possession, until it was finally vested in Naphtaly.

So that the title passed for value from the Romeros, the original Mexican claimants, ten years prior to final rejection of the title, and it similarly was vested in Millett four years prior to such rejection, and remained in him until long subsequent to the passage of the Act of July 23, 1866. The material fact, then, is that Millett purchased prior to the final rejection of the grant, and was at the date of the passage of the Act of July 23, 1866, a fully qualified beneficiary of the preference right of purchase under the seventh section thereof. The contention of plaintiff in error is therefore a mere denial of the assignability of that preferential right of purchase.

But the entire policy of the law in the matter is against restraints upon the alienation of interests in or titles to lands; and it has been uniformly held that every right, title, interest, or claim in lands is assignable or inheritable, unless such transfer or descent is prohibited by statute. *Co. Litt.* 46 *B.*; *Washburn on Real Property, Ch.* 1, *Sec.* 20; *Thredgill* v. *Pintard*, 12 *How.* 24; *Myers* v. *Croft*, 13 *Wall.* 291; *Lamb* v. *Davenport*, 13 *Wall.* 418; *Hussey* v. *Smith*, 99 U. S. 22. The most recent reaffirmance of this general right to assign interests in lands will be found in *Webster* v. *Luther*, 163 U. S. 311, wherein this Court affirmed the right to transfer before entry a right of additional homestead.

The language of the seventh section, Act of July 23,

1866, clearly does not prohibit the alienation of the preference right therein provided for; and neither would the purpose of the law. On the contrary, the statute in terms conferred the preference right only upon assigns. Nor did the law impose as a condition upon this right to purchase some act to be performed by a particular beneficiary of such character as to make the right a personal one. On the contrary, the condition of the law had already been performed, and the right to make entry had vested. It did not cease merely because, as in present case, the unsurveyed character of the land did not put it in condition for entry until the beneficiary had died or had alienated his interest. The continued possession and under purchase for value from the original Mexican grantee or his "assigns" were the equities to which the relief of the law was directed; and those equities, established and vested at date of the remedial Act, were quite as potent in the hands of one assign as in the ownership of another. The hardships of the case, which Congress had in view, were quite as great in either case; and whilst Naphtaly is chargeable at time of his purchase with notice of the prior rejection of the grant title, he is equally entitled to knowledge of the vesting of the preference purchase right and of its assignability. His right is clearly within the equity of the Act of Congress.

The rulings of the Land Department have been uniformly in support of the right of assignment (*Wilson* v. *C. & O. R.R. Co.*, 1 Copp's Land Owner, 471; *Owen* v. *Stevens*, 3 Land Decision, 401; *Welch* v. *Moline*, 7 *ib.* 210). Such continuous executive construction for thirty years past, and the innumerable rights vested thereunder, should constitute a very persuasive, if not wholly conclusive, argument.

IV.

Alleged Erroneous Citation of Statute in Naphtaly Patent.

Appellant strenuously contended below that the patent is void because, whilst Naphtaly's right of entry accrued under the Act of July 23, 1866, the patent erroneously recites its issuance under the Act of April 24, 1820, although the argument is not repeated here.

This objection is clearly without merit—

1st. Because it is a correct recital. The Act of April 24, 1820, the general provisions of which were carried into the Revised Statutes, fixed the minimum price of the public lands at $1.25 per acre; and all patents since issued for public lands paid for at that price have contained this same recital. The 7th section, Act of July 23, 1866, simply authorized the purchase therein provided for "at the mini-"mum price established by law," and the Act of April 20, 1820, fixed that minimum price. It was therefore a correct recital in the sale as the authority for the price paid.

2d. The patent contained the necessary and usual words of grant to carry title. Beyond question, it was sufficient to vest the legal title in Naphtaly. If there is any informality in the mere recitals upon its face, that is a matter which concerns only Naphtaly. It does not concern the appellant. Assuming such informality, Naphtaly could, if he deemed it important, seek relief and secure correction of such informalities, but it is not sufficient ground for appellant to set aside the patent of Naphtaly. The principle was clearly settled in *Kansas City, &c., R.R. Co.* v. *Attorney-General*, 118 U. S. 693, wherein the Court said:

"If there be any informality in the attempt of the Sec-
" retary of the Interior and of the State of Kansas to con-
" fer upon the Railroad Company the legal title to these
" lands, it is for the Company to seek relief and to have
" those informalities corrected, not for the United States to
" set aside its solemn instruments in which those rights are
" evidenced, and under which not only the Railroad Com-
" pany then interested, but its grantee, the present appel-
" lant, holds these lands or has sold them to innocent
" purchasers."

The assumption that appellant can maintain suit under Section 738 of the Code of Civil Procedure of California and the authorities cited in support thereof is not pertinent here. *If* the appellant had a case cognizable in equity by reason of superior equities, the law as declared by the Federal authorities *supra* would sustain that right independent of any State statute. As he does not possess such equities, and that conclusion is apparent upon the face of his bill, no State statute or code of procedure can aid him or have any bearing upon the question.

Conclusion.

Upon the one hand appears continuous use and possession by the original claimants since 1844, and their successive grantees in interest for a period of over fifty years. The protection of the equity of *that* possession was the clear design of the Act of 1866, which, as its title imports, was an Act "to quiet land titles in California." The Act has been so administered in numerous cases, and repeated judicial rulings have upheld such design and administration. Intruding upon that possession of many years come the defendants—admitted trespassers intruding with full knowledge of the existence and extent of the prior right and possession

far outrunning the common-law period of limitation. They have been again and again ejected under judicial process, returning *vi et armis* and in contempt of judicial process. What standing should they enjoy in any court of law or equity viewed from any legal or moral standpoint?

Under all the circumstances disclosed by the record the concurring decisions of the Circuit Court and Circuit Court of Appeals are manifestly right and should be here affirmed.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Appellee.